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THE ATTITUDE OF THE LEGISLATURE AND THE COURTS TO TAX AVOIDANCE *

WHAT is tax avoidance? The shortest definition I know is "The art of dodging tax without actually breaking the law"—a phrase which owes its origin to the title of Mr. Stephen Potter's book on gamesmanship—"The art of winning games without actually cheating." A more precise definition is not easy to frame.

First of all, tax avoidance must be distinguished from tax evasion. Avoidance is legal; evasion illegal. The man with a new Swiss watch in his pocket who says to the Customs "I have nothing to declare" is evading tax and should be clearly distinguished from the man who keeps within the law and does not use fraud or concealment.

Motive is also an essential element in tax avoidance. The man who deliberately adopts one of several possible courses, because that one will save him the most tax, must be distinguished from the man who adopts the same course for entirely different reasons. A tax avoidance transaction is one which would not be adopted if the tax-saving element had not been present.

The motive of the legislature must also be taken into account. Several of our taxes are imposed for economic or social reasons as well as for fiscal ones; the high tax on spirits was intended to reduce drunkenness, just as the additional profits tax on distributed profits was imposed to reduce dividends. A taxpayer who acts as the legislature intends him to, and reduces his drink, or his company's dividend, cannot fairly be described as a tax avoider.

Hence, we must define tax avoidance as a transaction which (a) avoids tax, (b) is entered into for the purpose of avoiding tax or adopts some artificial or unusual form for the same purpose, (c) is carried out lawfully, and (d) is not a transaction which the legislature has intended to encourage.

Tax avoidance is nothing new. The conveyance of land to A to the use of B was used in the fifteenth and sixteenth centuries

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to avoid incidents of manorial tenure, and the Statute of Uses is one of the earliest examples of anti-avoidance legislation.[1] Although of respectable antiquity, the art of tax avoidance did not really come into its own until after the First World War, for it was not until then that the rate of taxation was sufficiently high to make the tax saving outweigh the expense and inconvenience of tax avoidance measures. But by 1920 it was generally realised that high taxation had come to stay and a large number of ingenious devices have since been invented and perfected to enable the well-advised taxpayer to pay less than he otherwise would. Naturally, the increase in taxes occasioned by the Second World War encouraged the practice still further, particularly in relation to income tax, surtax and estate duty, which in the top levels can take 95 and 80 per cent. respectively of the income or capital concerned.

How Tax Avoidance Works

Tax avoidance takes many forms and a comprehensive list of all tax avoidance devices current since 1920 would fill a book. Here are some examples of the principal methods which I have on my list.

(1) Schemes which depend on getting the taxpayer or his property or both outside the jurisdiction of the U.K. tax laws. These range from the taxpayer going bag and baggage to the Channel Isles, to elaborate schemes in which he stays here but his property is transferred to foreign trustees or to a foreign holding company.[2]

(2) The purchase of a defunct company which has made a heavy loss so as to use up that loss against future profits. An entertaining spectacle in English commercial life is the bargaining on such a sale where the vendor does his best to emphasise how insolvent his company is. A variant on this theme is the Schedule D taxpayer who farms his country estate at a loss in reduction of his surtax but improves it all the time, so that it ultimately sells for a nice capital profit.

(3) Taking in a new partner or retiring an old one whenever it suits a partnership to claim a cessation of the old partnership under the complicated rules resulting from tax being normally assessed on last year's profits.

(4) Accumulating income by means of a trust so as to avoid surtax. Previously this was also done by using a company which did not fully distribute its income [3] or by delaying the winding up of the estate of a deceased person and using income to pay debts.[4]

[1] See Holdsworth's *History of English Law*, Vol. IV, pp. 446 *et seq.*
[2] The latter now have a formidable obstacle in I.T.A., 1952, s. 412.
[3] See now I.T.A., 1952, ss. 245–264.
[4] See now I.T.A., 1952, ss. 418–424.

(5) Arranging for the tax avoider's income to come to him as capital. Two examples are: (a) letting property on a lease at a large premium with a much reduced rent and (b) selling securities just before the dividend is paid and repurchasing them after.[5]

(6) Arrangements between a friendly employer and employee which suit them both to the disadvantage of the Inland Revenue. These often take advantage of the doctrine that damages or compensation for loss of office are capital in the hands of the recipient but are allowed as deductions by the employer for his tax purposes.[6] Lump sums paid to commute a pension are also " heads we both win, tails the Revenue loses." [7]

(7) Transferring income from a high surtax payer to someone who pays no surtax or only very little. If the latter has such a small income that he can get income tax relief as well, so much the better. Income can be transferred by settling property producing the income, or by a deed of covenant, or by a company transaction such as appointing the tax avoider's child to be a director with nominal duties.[8] It can also be done by an order of the Divorce Court, which is particularly remunerative. A man with an income of £5,000 per annum, mostly earned, who lives happily with his wife and three young children, pays £2,375 per annum in income tax and surtax. If, after a divorce, the same man agrees to an Order of the Divorce Court to pay £1,500 per annum to the wife and £500 directly to each child, the total tax paid by all five of them will only be about £1,500 per annum—a saving of £875 per annum—and there is no legal reason to stop them all living together again once the decree is absolute!

(8) Arranging for part of the tax avoider's ordinary expenditure to be made in a form which qualifies as a deduction for tax purposes from his business or private income. Examples range from paying charitable subscriptions, allowances to relations, or other domestic expenditure by deed of covenant (even gardeners have been successfully paid by seven-year deeds) to elaborate loan transactions in connection with life policies, or to arrangements with the avoider's private company to own and run " his " car or arrange for him to go on business trips to the South of France. Here, of course, we are getting near evasion but many " expense " dodges keep within the letter of the law.

So far I have given examples of avoidance of taxes on income and have by no means exhausted my list of these. I have another list, nearly as long, of methods of avoidance of estate duty, but

5 I.T.A., 1952, s. 203, is somewhat of a deterrent but is by no means completely " tax-avoider proof."

6 *Du Cros* v. *Ryall* (1935) 19 T.C. 444.

7 *Wales* v. *Tilley* [1943] A.C. 386; [1943] 1 All E.R. 280. Hence the requirement in I.T.A., 1952, s. 388 (*e*) that pensions paid by " approved " superannuation schemes must not be assignable.

8 For a case where the Revenue successfully challenged such a transaction, see *Copeman* v. *Flood* [1941] 1 K.B. 202

these are somewhat technical and they would need a lecture to themselves to explain how they work. Suffice it to say that they are now extremely effective and enable those wealthy persons who know the ropes to reduce the estate duty on their deaths by 40 or 50 per cent.

The Undesirability of Tax Avoidance

We now come to the problem "is tax avoidance desirable"?

I start with the proposition that however pleasant it may be to avoid tax oneself, the practice is undesirable from a national aspect and should be discouraged by Parliament. Quite apart from the substantial loss of revenue involved, there is also a large hidden loss to the community in the employment of a number of our best brains on one side or the other of the tax avoidance battle. It is by no means uncommon for the tax avoider to have his schemes prepared by a team consisting of two or more barristers, a solicitor with his managing clerk, and several accountants with their principal clerks. On the other side the Inland Revenue have their advisers, not perhaps so numerous, not always so highly paid, but equally skilful in the art.

In effect, the community pays for both sides, as the tax avoider would not exist unless his tax saving considerably exceeded the by no means insignificant fees of his advisers.

Of even greater importance than the loss of revenue and cost to the community is the sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it. Adam Smith's first canon of taxation asserted that each person should pay according to his means,[9] and, although the doctrine has now been made progressive so that the more you have the higher proportion you pay, the principle of equality between persons of similar means is inherent in our system of direct taxation.

But opportunities for tax avoidance are by no means equal to persons with similar means. The extent of a tax avoider's success often depends almost entirely on the technical ability of his lawyer or accountant to take advantage of such fortuitous circumstances as are available. A system of taxation which means that you pay more or less than your neighbour according to the skill of your adviser, or the presence of some circumstance which affects you and not your neighbour, such as a divorce, or the ownership of a suitable company, or the fact that you are taxed under Schedule D, whilst your neighbour pays under Schedule E, is not likely to command general respect.

Indeed, the great increase of tax evasion in recent years can partly be attributed to the prevalence of tax avoidance. If A sees B "get away with it" by legal means which are not open

[9] *The Wealth of Nations*, Book V, Chap. II, Part II.

to him, he is sorely tempted to adopt illegal means to achieve the same result. The great majority of citizens, who are taxed by P.A.Y.E and whose property is limited at most to the house in which they live and some small savings, have little opportunity to practise tax avoidance, and to them these devices are barely distinguishable from evasion.

Tax avoidance has its defenders. One school of thought, led by Sir John Hampden's ghost, asserts that as all tax laws are an encroachment on the liberty of the citizen he is perfectly entitled to get round them if he can legally do so. The argument of another school is based on the simple proposition that taxation on the wealthy is much heavier than it ought to be, and that as they could not continue to exist without tax avoidance it is essential that their means of survival should remain.

But if you regard our taxes as the contribution that each of us makes to the country's expenditure on our joint behalf, these arguments ring a little hollow. If John Smith pays less tax than he should, all the others have to pay more. His "liberty" to avoid tax is an infringement of your and my right to receive a fair contribution from him. What is his fair contribution may well be a matter for argument but certainly he is not the proper person to decide what it should be.

The Difficulties Inherent in Anti-avoidance Legislation

It is, I think, fairly easy to make the case against tax avoidance. The trouble comes in suggesting any remedy which is not completely contrary to Adam Smith's second canon of taxation.[10] This ran as follows—

> "The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid ought all to be plain and clear to the contributor and to every other person."

Now even in 1920 this maxim could not be applied to the taxes of the United Kingdom but the position is far worse today and anti-avoidance legislation is responsible for much of the added obscurity. An example is the Finance Act, 1940, about which, in a recent judgment,[11] Lord Simonds, when Lord Chancellor, said: "The alternative claim which arises under section 46 of the Finance Act, 1940, must now be considered. It involves the consideration of provisions which are, I think, of unrivalled complexity and difficulty, and couched in language so tortuous and obscure that I am tempted to reject them as meaningless." Section 46 of the Finance Act, 1940, is by no means the only section which is obscure to the most experienced lawyers.

[10] *Ibid.*
[11] *St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15 at p. 30; [1951] 2 All E.R. 473.

Anti-avoidance legislation here involves a further undesirable feature. If the net is cast sufficiently wide to catch all tax avoiders the innocent citizen on his lawful occasions may also find himself caught. An example of this is the same 1940 Finance Act which is generally considered to have gone too far in the incidence of estate duty on holdings in private companies and has since been amended in favour of the taxpayer.[12]

If our tax laws become so complicated that the citizen has to take advice on his tax position before entering into any normal business or family transaction, then the cure may become worse than the disease. The problem, therefore, which has faced and is still facing the legislature, and which faces us as lawyers and citizens of a democratic state, is how to prevent tax avoidance without incurring greater evils. The object of this lecture is to draw attention to the problem, to study how the courts and the legislature have dealt with it so far, and to offer a few suggestions for consideration and discussion.

The Attitude of the Courts

Before we look at the acts of the legislature we must first of all consider the attitude of the courts to the problem, because the acts of the legislature can only be enforced by the courts and the wording of Acts of Parliament is necessarily conditioned by the way in which the courts interpret them.

As taxation is the creation of statute and not of common law the problem in a tax case is usually in two parts—first, what is the meaning of the relevant statute? Secondly, does the true effect of the acts or omissions of the taxpayer come within or without that meaning?

In construing a statute it is necessary to ascertain the intention of the legislature but it is now settled law, at least so far as Revenue cases are concerned,[13] that the only indication of that intention that a judge may look at is the text of the statute itself, having regard to the state of the law as it was before the Act was passed. He may not consider the speech of the Chancellor when introducing the Bill in question in the House of Commons, nor the subsequent debate, nor even the report of a Royal Commission from which the clause is taken.[14]

This limitation may leave a judge in some difficulty when it comes to construing a modern Finance Act and he has to do the best he can with the words of the Act. Two quotations will make this clear. The first is from a very experienced judge in tax

[12] See F.A., 1954, ss. 29 and 30.

[13] How far this applies in other types of case is discussed in an article by Mr. B. B. Benas in (1952) 102 L.J. at p. 269.

[14] *Per* Lord Wright in *Assam Railways and Trading Co., Ltd.* v. *I.R.C.* [1935] A.C. 445 at p. 456.

matters, Mr. Justice Rowlatt,[15] who said: "In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." This statement was recently approved by Lord Simon, when Lord Chancellor, in a judgment in the House of Lords.[16] The other quotation is from Lord Cairns many years ago[17]: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you simply adhere to the words of the statute." This statement has also been approved by subsequent judgments in the House of Lords.[18]

The origin of this rule of strict construction of taxing statutes is not very clear. It probably originated in the dislike of judges for unmeritorious defences to civil actions based on stamp duty points and was originally stated more as a rule that the onus was on the Crown to show clearly that the case fell within the statute.[19] The rule does not appear to have been adopted in the U.S.A. where a more equitable construction is applied.[20]

When the true meaning of the statute has been ascertained the court has next to find the facts in order to see whether the actions of the taxpayer fall within or without the statute.

Now, most Revenue cases come, in the first instance, before either the General or the Special Commissioners. The General Commissioners are laymen and sit, like J.P.s, with a legally trained clerk. The more important cases are usually heard by the Special Commissioners, all of whom were either trained lawyers or experienced Inland Revenue officials before their appointment.

The Special Commissioners are one of the curiosities of the English Constitution. They break many of the accepted conventions of judicial procedure. They sit in private, their procedure is informal, they often act on unsworn evidence; and, worst of all,

15 *Cape Brandy Syndicate* v. *I.R.C.* [1921] 1 K.B. 64 at p. 71.

16 *Canadian Eagle Oil Co., Ltd.* v. *R.* [1946] A.C. 119 at p. 140; [1945] 2 All E.R. 499.

17 *Partington* v. *Att.-Gen.* (1869) L.R. 4 H.L. 100 at p. 122.

18 *I.R.C.* v. *Barclays Bank* [1951] A.C. 421, at p. 439; [1951] 1 All E.R. 1. *Pott's Exors* v. *I.R.C.* [1951] A.C. 443 at p. 456; [1951] 1 All E.R. 76.

19 See Lord Ellenborough's judgment in *Warrington* v. *Furbor* (1807) 8 East. 242.

20 See the Supreme Court decision in *Re Cliquot's Champagne* (1865) 3 Wallace 145.

they are permanent employees of one party to every dispute they try! Yet they give very general satisfaction and there is little complaint about them from the taxpayers' side.[21] The General Commissioners, although ordinary taxpayers themselves, are not generally considered to be such a good court.

The decision of either type of commissioners is final on questions of fact but an appeal lies to the High Court on questions of law. The procedure is by way of case stated and in the case the commissioners have to set out in considerable detail the evidence tendered and the facts they find.

This procedure encourages them to adopt a limited construction of the evidence put before them. They have also been told to do so by a decision of the House of Lords. In that case[22] a former Duke of Westminster entered into deeds of covenant to pay weekly sums to a number of his servants and thereafter reduced their wages by the same amount as was payable under the deeds of covenant. Whether in the circumstances the servants could have legally claimed both their full wages and the money under the deed was a matter of some doubt, although a majority in the House of Lords thought they could have done so, but apparently none did so. The Duke claimed that the payments under the deeds were deductible in computing his surtax, but when the case originally came before the Commissioners they took the view that these payments were "in substance" payments of remuneration, and they accordingly refused to allow the claim. However, the House of Lords, by a majority of four to one, decided that the courts could not disregard the form of the transaction and substitute their own view of "substance" unless it was alleged, and proved, that the form was a sham and was not intended to be given legal effect. As, in this case, the deeds of covenant were certainly intended to be given effect to and were, in fact, acted upon, the House held that they were valid to reduce the Duke's surtax. Although payments to servants under deeds of covenant were made ineffective as surtax deductions by the Finance Act, 1946,[23] the principle established in the *Duke of Westminster's* case still remains good law, and, so long as the form of the transaction is in fact carried out, it cannot be disregarded by the Commissioners or the court in favour of some more normal and likely form which would have attracted greater tax.

Hence, a strict construction is applied both to the wording of the statute and to the form in which the taxpayer has clothed his action. In neither case do considerations of "equity" or "substance" arise. If the tax avoider is clever enough to get himself outside the wording of the taxing Act, then he escapes, and his

[21] See the final report of the Committee on Supreme Court Practice and Procedure (Cmd. 8878), para. 542.
[22] *I.R.C.* v. *Westminster* (*Duke*) [1936] A.C. 1.
[23] Now I.T.A., 1952, s. 415.

motive, the legislature's motive, and the practical effects of the transaction are all alike irrelevant. In the words of Lord Tomlin in the *Duke of Westminster's* case [24]: "Every man is entitled if he can to order his affairs so as that the tax attracted under the appropriate Act is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

In a previous tax case in the House of Lords, Lord Sumner said [25]: "My Lords, the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express term or of any omissions that he can find in his favour in the taxing Acts. In so doing he neither comes under liability nor incurs blame."

In another case, two years later,[26] Lord Sumner said: "It is trite law that His Majesty's subjects are free, if they can, to make their own arrangements so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties, and, strictly speaking, no moral censure if having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them." The phrase, "strictly speaking, no moral censure" rather looks as though Lord Sumner was extending into the sphere of morality the doctrine of strict construction of taxing statutes!

A somewhat stronger pronouncement came from a Scots judge, Lord Clyde, Lord President of the Court of Session, who said [27]: "No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue."

However, this attitude on the moral aspect of tax avoidance was strongly refuted by Lord Simon when Lord Chancellor. He said [28]: "My Lords, of recent years much ingenuity has been expended in certain quarters to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the

[24] [1936] A.C. at pp. 19, 20.
[25] *I.R.C.* v. *Fisher's Executors* [1926] A.C. 395 at p. 412.
[26] *Levene* v. *I.R.C.* [1928] A.C. 217 at p. 227.
[27] *Ayrshire Pullman Motor Services* v. *I.R.C.* (1920) 14 T.C. 754 at p. 763.
[28] *Latilla* v. *I.R.C.* [1943] A.C. 377 at p. 381; [1943] 1 All E.R. 265.

benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres."

A somewhat similar attitude was expressed by Lord Greene, when Master of the Rolls, in dealing with the construction of an anti-avoidance section. He said [29]: "The section is a penal one, and, whatever its consequences may be, they are intended to be an effective deterrent to practices which the legislature considers to be against the public interest. For years a battle of manoeuvre has been waged beween the legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow-subjects. In the battle the legislature has often been worsted by the skill, determination and resourcefulness of its opponents, of whom the present appellant has not been the least successful. It would not shock us in the least to find that the legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers."

The views of Lord Simon and Lord Greene are now becoming more widely held than before but whatever may be the personal sympathies of a judge who tries a Revenue case, his decision has to be based on purely legal and technical grounds, and Parliament can expect no discretion or elasticity from the courts in enforcing taxation law.

The courts have also had to consider their attitude to tax avoidance in another context. When a court has a statutory or inherent power to approve, or refuse approval, of some legal transaction, such as the reduction of a company's capital, should it be influenced by the fact that tax avoidance is an element in the transaction? For some time judges propounded a doctrine that the court should not assist tax avoidance and that such transactions as the alteration of an objects clause in a memorandum of association,[30] or a scheme under section 57 of the Trustee Act, 1925,[31] should not be approved if tax avoidance was their purpose. The strongest case

[29] *Lord Howard de Walden* v. *I.R.C.* [1942] 1 K.B. 389 at p. 397; [1942] 1 All E.R. 287.
[30] *Re Drages, Ltd.* [1942] 1 All E.R. 194.
[31] *Re Basden's Settlement* [1943] 2 All E.R. 11.

is a decision of the Court of Session which refused to approve a reduction of capital on this ground [32] but since a decision of the House of Lords that approval of a reduction of capital, which was intended to dodge the steel nationalisation proposals, ought not to be refused [33] the Court of Session has reversed its previous practice and does not now treat tax avoidance as a ground for refusal of a reduction petition.[34]

In England the judicial tide has also set an uncertain course on this problem. The Court of Appeal has approved a settlement of a lunatic's property for the purpose of avoiding duty on his death [35] and a divorce judge has approved a variation of a settlement notwithstanding that it was put forward to save tax.[36] Two Chancery judges refused to approve three schemes to recast trusts with a view to avoiding duty but the Court of Appeal approved two of the schemes and refused the third.[37] The House of Lords [38] confirmed this latter refusal and indicated they would also have refused the other two but they did so on the ground that the schemes were outside the jurisdiction of the Chancery Court, and not because the object was tax avoidance.

In the Court of Appeal the Master of the Rolls (Sir Raymond Evershed) said [39]: "It is not an objection to the sanction of the court of any proposed scheme in regard to trust property that its object or effect is, or may be, to reduce liability for tax including death duties"; but in a later part of the judgment he added [40] "Although the fact that a scheme will result in the saving of death duties or income tax, is, in itself, no ground for its rejection, the acceptance of the scheme now under consideration might well be followed by the presentation of further proposals of a similar character whenever it should be considered desirable in the future to avoid or mitigate the effect of such changes as may occur hereafter in the existing fiscal legislation. We would point out, therefore, that it is no part of the functions of Her Majesty's courts to recast settlements from time to time merely with a view to tax avoidance even if they had the power to do so, which, in our opinion, they have not."

In approving that part of the judgment Lord Morton, in the House of Lords said [41]: "If the court had power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery

[32] *Re A. & D. Fraser, Ltd.*, 1951 S.C. 394.
[33] *Ex p. Westburn Sugar Refineries, Ltd.* [1951] A.C. 625.
[34] *Re David Bell, Ltd.*, 1954 S.C. 33.
[35] *Re C.W.M.* [1951] 2 K.B. 714; [1951] 2 All E.R. 707.
[36] *Thomson* v. *Thomson & Whitmee* [1954] P. 384; [1954] 2 All E.R. 462.
[37] *Re Downshire, Re Chapman, Re Blackwell* [1953] Ch. 218; [1953] 1 All E.R. 103.
[38] *Chapman* v. *Chapman* [1954] A.C. 429; [1954] 1 All E.R. 798.
[39] [1953] Ch. at p. 232.
[40] *Ibid.* at p. 266.
[41] [1954] A.C. at p. 468.

Division and the legislature. The alteration of one settlement for the purpose of avoiding taxation already imposed might well be followed by scores of successful applications for a similar purpose by beneficiaries under other settlements. The legislature might then counter this move by imposing fresh taxation on the settlements as thus altered. The beneficiaries would then troop back to the Chancery Division and say: ' Please alter the trusts again. You have the power, the adults desire it, and it is for the benefit of the infants to avoid this fresh taxation. The legislature may not move again.' So the game might go on, if the judges of the Chancery Division had the power which the appellants claim for them, and if they thought it right to make the first move."

In effect, therefore, the court will not refuse to consider a scheme which avoids tax, but it will keep this aspect under consideration and not give such a scheme undue encouragement.

The Attitude of the Inland Revenue

I have now dealt with the attitude of the courts, both in Revenue and non-Revenue cases, and must now turn to the legislature. Before doing so it is necessary to look for a moment at the attitude of the Board of Inland Revenue. Before a Revenue case gets to the courts, the Board must decide that it should be fought, and if the Board interprets a particular taxation provision in a manner favourable to the taxpayer then the courts never even have the opportunity of construing the clause in question. An example is the Divorce Court order which I mentioned before—here the Revenue have interpreted the law favourably to the tax avoider. Payments under such an order by a father or mother in favour of his or her infant child are regarded by the Revenue as the income of that child.[42] Even a consent order of this type is not treated as within sections 397–403 of the Income Tax Act, 1952, which deem income of an unmarried child under twenty-one arising under a disposition, agreement or arrangement by the parent as the income of the parent. Another example is the Revenue ruling that a tenant for life who buys the reversion avoids estate duty on his death on the price he pays, whilst duty is payable if the reversioner buys out the tenant for life.[43]

Even when the law is clearly in the Revenue's favour the Board exercises a discretion to let the taxpayer off if it considers that enforcement of the law would do injustice. It does this either by publishing an "extra-statutory concession"[44] or by the gradual

[42] See Simon's *Income Tax* (2nd ed.), Service volume referring to Vol. 3, s. 104.

[43] See the statement by the Attorney-General in the House of Commons on June 19, 1950 (Hansard, cols. 962–3), and the views expressed by various text books, *e.g.*, Dymond, 11th ed., at p. 91.

[44] Lists of these are regularly published in the Annual Report of the Board of Inland Revenue—see reports for years ending March 31, 1950, 1951, 1952, 1953 and 1954 respectively.

formulation of an "office practice" which becomes known outside.

An instructive example of the way taxation is altered without legislative sanction is shown by a recent announcement of the Revenue [45] which referred to two previously published Estate Duty concessions and to the Finance Act, 1954. It then went on to say "The Chancellor of the Exchequer has accordingly decided that the above mentioned concessions shall not be granted in cases falling under section 16 (3) of the Finance Act, 1954, *i.e.*, where the death occurred on or after July 30, 1954. The concessions will continue to operate as at present in relation to other relieving sections."

Whilst the Revenue acts in this way in a praiseworthy attempt to have reasonable public relations with the taxpayers who are its clients, one result is unfortunate. By protecting the legislature from criticism of unfair and sometimes badly drafted legislation, there is less anxiety to amend and correct the law. The taxpayer who benefits by a Revenue concession does not complain.

With this background let us now see how the legislature has dealt with the problem.

The Attitude of the Legislature

At the outset it is desirable to distinguish indirect from direct taxation. A tax on a particular commodity or transaction can normally be defined with reasonable clarity, and those who use the commodity or enter into such a transaction cannot easily avoid the tax.

But with taxes based on conceptions of "income" or "capital" the draftsman is faced with three major problems:

(1) Neither conception is capable of an accurate definition; economists, accountants and lawyers all differ in the meanings they attach to the two words,[46] and the average man probably agrees with none of them. Even two basically similar systems of law as our own and that of the U.S.A. have developed major divergences of interpretation. What we call "capital profits" and treat as tax free are regarded as income and taxed in the U.S.A.; a distinction which originally arose from differing decisions by the courts of the two countries as to the meaning of "income" and not from any legislative definition.[47]

(2) The differing circumstances and conditions of so many taxpayers lead to a simple tax being unfair in many special cases. An

[45] See *Law Society's Gazette* for December, 1954, at p. 525.

[46] A report in 1951 of a joint committee of leading accountants and economists shows this clearly (*Some Accounting Terms and Concepts*. Cambridge University Press).

[47] See an interesting study of Canadian, U.S.A. and U.K. conceptions of "income" for tax purposes in *Taxation in Canada* by J. Harvey Perry (University of Toronto Press), pp. 35 *et seq.*

income or capital tax which attempts to deal justly with each individual must contain many complicated conditions and provisos.

(3) The cost of administration and enforcement imposes considerable limits on the exceptions and qualifications which can be introduced. A good example is the capital levy called "Special Contribution" which was imposed in 1948,[48] but which for administrative reasons had to be based on income tax returns excluding earned income. The staff of the Inland Revenue could not possibly have coped at that time with separate "returns" of capital.

The legislature's own procedure adds further complication. First of all is the tradition that Finance Bills are always dealt with by a Committee of the Whole House and are never referred to small committees. The shortage of parliamentary time makes it necessary for the government of the day to frame its provisions so as to leave the minimum scope for argument or amendment. Added to all this is the natural reluctance of chancellors, and of the Inland Revenue, to alter anything unless they have to and then only to the minimum extent required. The more extensive the alteration, the more difficult it is to forecast the yield of next year's tax.

The report of the Macmillan Committee in 1936,[49] which produced a draft Bill to codify the then income tax law, contains a striking indictment of the state of that law and makes very sad reading when one remembers that the work of that Committee was wasted. The Income Tax Act of 1952 is only a consolidation Act and did not codify. Nothing was done to remove obscurities and contradictions in the law. Estate duty law has not even got a consolidating Act—it is now contained in some seventy Acts of Parliament.[50]

The recent complete overhaul of the U.S.A. Internal Revenue law, largely effected through small but strong committees of both Houses of Congress, shows what can be done.[51]

The legislature here starts with a patchwork quilt[52] of legislation of involved and doubtful meaning and it has to amend it piecemeal. Hence the problem of dealing with tax avoidance is much more difficult than it would be if there was a clear and coherent law to start with.

The most obvious and clearly the best method of preventing any particular type of tax avoidance is to amend the general law

[48] See F.A., 1948, ss. 47–68.
[49] Cmd. 5131.
[50] Dymond (11th ed.) contains the text of parts of 71 Acts up to and including F.A., 1950.
[51] U.S.A. Internal Revenue Code, 1954.
[52] A scathing description of the patchwork nature of our Revenue law is contained in the Macmillan Report (Cmd. 5131), paras. 18 *et seq.* That was nearly 20 years ago.

affecting transactions of that type, so that it is stated in a manner which covers all contingencies and leaves no loopholes for the avoider. In some parts of our taxation law there is no great difficulty in doing this and a part of the anti-avoidance legislation in the past thirty-five years consists of a clarification of the law on a particular point. An example of this is Part IX of the Income Tax Act, 1952,[53] which provides for the incidence of income tax and surtax on estates of deceased persons in course of administration.

But this method is not always possible. Often a clearly defined line cannot be drawn to show where taxation should begin or end, particularly with transactions which adopt the same form when they are entered into for ordinary commercial reasons as when tax avoidance is the motive.

Can motive be made the test? The legislature tried to do this by putting a provision in the Excess Profits Duty legislation during the First World War[54] which said that no deduction should be made in respect of any transaction or operation of any nature if and so far as it appeared that the transaction had or would artificially reduce profits. There was no definition of "artificially" in the Act and the reported cases on this provision do not supply one.[55]

A slightly extended but similar provision was included when National Defence Contribution (now Profits Tax) was introduced in 1937[56] and was applied to Excess Profits Tax in 1939,[57] but there do not appear to have been any reported cases on these provisions. It seems clear, however, that the Revenue did not feel that they went far enough and for Excess Profits Tax the legislature went a step further. Section 35 (1) of the Finance Act, 1941, ran as follows: "Where the Commissioners are of opinion that the main purpose for which any transaction or transactions was or were effected was the avoidance or reduction of liability to Excess Profits Tax, they may, if they think fit, direct that such adjustments shall be made as respects liability to Excess Profits Tax as they consider appropriate so as to counteract the avoidance or reduction of liability to Excess Profits Tax which would otherwise be effected by the transaction or transactions."

Section 33 of the Finance Act, 1944, extended the words "the main purpose" to "the main purpose or one of the main purposes" and in the case of two particular types of transaction—purchase or acquisition of shares in the company or a change in partnership—turned the test of "purpose" from a subjective to an objective one by providing that, if the main benefit to be

[53] I.T.A., 1952, ss. 418–424.
[54] F.A. (No. 2), 1915, Sched. IV, Part I, para. 5.
[55] See *Scottish Adhesives Co.* v. *C.I.R.* [1921] 1 A.T.C. 42, and *J. H. Young & Co.* v. *C.I.R.* (1926) 12 T.C. 827.
[56] F.A., 1937, Sched. IV, para. 10.
[57] F. (No. 2) A., 1939, Sched. VII, Part I, para. 9.

expected to accrue from a transaction was avoidance or reduction of tax, then avoidance or reduction of tax should be deemed to have been a "main purpose."

This latter change is of considerable interest.[58] Presumably, the Revenue thought it too difficult to satisfy the Special Commissioners as to the real intention of the taxpayer and therefore Parliament ascribed to him the normal consequence of his acts as a "statutory" intention. This shows up in striking fashion the difference of the approach of the Commissioners in Revenue cases compared with the approach of judges, juries and magistrates in criminal cases. Although a guilty intention is an essential element in many crimes, the criminal law has found no great difficulty in inferring it from the actions of the accused.

Section 32 of the Finance Act, 1951, which applies similar provisions to Profits Tax,[59] follows the model of the 1944 Act and applies the "objective" test when considering the intention to avoid tax in connection with transfers, or acquisitions, of shares or debentures, changes in partnerships or changes in director control of companies. On the other hand, a transaction which avoids tax by reducing a company's distribution of profits is specifically excluded from the section. In this way this section contains the nearest parallel in U.K. legislation to the definition of tax avoidance attempted at the beginning of this lecture.

There is no general anti-avoidance provision of this kind affecting income tax, surtax or estate duty, but a somewhat similar method has been used to deal with three particular types of avoidance. For surtax purposes the Special Commissioners have been given a discretion to say whether a "controlled" company has distributed a reasonable proportion of its income and, if they say it has not, they may surtax the company on the liability of its members as if the income had been distributed.[60]

Similarly, the Special Commissioners have a discretion to say whether a transfer of assets resulting in income becoming payable to a person abroad was or was not effected for the purpose of avoiding tax or whether it was a bona fide commercial transaction not designed for avoiding tax. If they find the purpose was innocent then certain severe taxation provisions do not apply.[61]

The third case is where it appears that the sole or main benefit which might have been expected to accrue from a sale of property is the obtaining of an allowance or deduction under Parts X or XI

[58] The effect of F.A., 1944, s. 33, is considered and explained in *Crown Bedding Co., Ltd.* v. *I.R.C.* [1946] 1 All E.R. 452.

[59] It was also applied to Excess Profits Levy by F.A., 1952, s. 69.

[60] This was done by a series of legislation starting with F.A., 1922, s. 21, and which is now contained in I.T.A., 1952, ss. 245–264. A somewhat similar provision in F.A., 1940, s. 32, allows the commissioners to say if deductions for expenses in computing profits are "reasonable" and if not to disallow them for Profits Tax.

[61] F.A., 1936, s. 18; now I.T.A., 1952, s. 412.

of the Income Tax Act, 1952, which deal with initial allowances and depreciation. If the Commissioners so find, the tax of the parties is adjusted.[62]

In all these cases the anti-avoidance provisions are only applied if the Inland Revenue set them in motion, and the surtax liability on companies has been rarely applied since government policy favoured a dividend "freeze" except in cases where the Revenue thought "avoidance" had been intended.[63]

But these are substantially the only cases where the General or Special Commissioners, and through them the courts, can take account of the motive of the tax avoider and the legislature has relied on a number of other methods to deal with avoidance. These can be classified by types as follows: (1) The "patching" method; (2) the "hit-or-miss" method; (3) the use of prior departmental consent; (4) making the law too wide and relying on the good sense of the Inland Revenue in enforcement; and (5) retrospective legislation. Frequently the same legislation adopts two or more of these methods.

The "patching" method consists in passing a law which is aimed at a particular type of transaction and which deals with it as a special case without attempting to fit it into the general principles of the tax in question. An example is in section 12 of the Finance Act, 1937,[64] which deals with "bondwashing" (*i.e.*, selling securities before the dividend and repurchasing after).

Whilst this method is usually effective to deal with the type of avoidance in question the practice of legislating separately for a number of special cases leads to numerous fine distinctions and illogicalities in the general law.

The "hit-or-miss" method consists in the legislature drawing an arbitrary line which has no particular equitable or moral justification, but can be easily defined, and saying that taxpayers on one side of the line will pay and those on the other will not. Usually the line is so drawn as to bring all the likely cases into the paying class, so that the other cases will be few and will so cause only a small loss to the Revenue. A typical example of this method is the treatment of deeds of covenant.

Here, a number of lines have been drawn and only a small and extremely illogical area of safety remains. All deeds of covenant not exceeding six years are useless,[65] as also are deeds in favour of the covenantor's unmarried children between April 5 following their birth and April 5 following their twenty-first birthday.[66] There is, of course, no reason why a deed for seven years should

[62] I.T.A., 1952, s. 327.
[63] See the statements by the Chancellor of the Exchequer in the House of Commons on July 22, 1948, which specifically referred to "avoidance devices" as being a ground for use of the section.
[64] Now I.T.A., 1952, s. 203.
[65] F.A., 1922, s. 20, now I.T.A., 1952, s. 392.
[66] F.A., 1936, s. 21, now I.T.A., 1952, s. 397.

be more meritorious than one for six, and it certainly is not desirable for parents to neglect their children of school age whilst supporting their married children, or those over twenty-one. Further legislation has rendered covenants for accumulation useless for tax purposes,[67] as also are covenants in favour of employees since the Duke of Westminster was successful with his.[68] Finally, covenants in favour of charity are useless for avoiding surtax, although the charity can still recover income tax.[69] But despite these restrictions, deeds of covenant flourish and multiply. In 1952 the Financial Secretary to the Treasury said in Parliament that there were 600,000 in operation.[70]

A similar method has been adopted with settlements of property which are now hedged in by numerous restrictions, which make tax avoidance difficult, but by no means impossible to those whose circumstances are a little unusual.[71] Probably the most striking example is the enormous tax benefit available to the surtax payer who is living with someone not his wife and is prepared to settle property on her or make a seven-year covenant in her favour. The legislature presumably assumes that only a small proportion of men are prepared to tie up capital or pledge income for seven years in favour of a mistress, although with the aid of a discretionary trust and a friendly trustee the risk of having to continue paying after she has walked out can be avoided in practice.

Another example of the " hit-or-miss " method is the provision in the Finance Act, 1948,[72] dealing with expenses of directors of companies and employees earning over £2,000 per annum which makes these persons subject to special restrictions and additional liability to tax. There is, of course, no moral or equitable reason why the expenses of a man earning more than £2,000 per annum or of a director of a company should be singled out for particularly onerous treatment, but the fact that surtax begins at £2,000 makes tax avoidance more likely by those earning more, so the discouraging line is drawn at that point. Directors are also included on the sole ground that their opportunities for avoidance are greater than those of ordinary mortals.

Another example was the requirement in the Finance Act, 1940, that shares in a company controlled by the deceased were to be valued for estate duty on an " assets " basis.[73] The definition of " control " is arbitrary [74] and its only justification is that it catches most people who would be able to carry out estate duty avoidance by artificial company transactions if they wished to do so. The

[67] F.A., 1938, s. 39, now I.T.A., 1952, s. 407.
[68] F.A., 1946, s. 28, now I.T.A., 1952, s. 415.
[69] *Ibid.*
[70] Answer in Parliament on April 29, 1952.
[71] See I.T.A., 1952, ss. 397–411 and s. 415.
[72] F.A., 1948, ss. 38–46, now I.T.A., 1952, ss. 160–168.
[73] F.A., 1940, s. 55.
[74] *Ibid.*, as amended by F.A., 1954, s. 29.

difference between an "assets value" and a "market value" is often quite substantial, so that a considerable sum in duty may depend on whether the deceased at some relevant time had "control." Whether he attempted duty avoidance or not is entirely irrelevant.

The next method to consider is the use of prior departmental consent. This is appropriate to deal with various types of avoidance which require some preliminary step by the taxpayer which can be conveniently regulated by a Government Department. An example of this method is the restriction on transfers of property outside the sterling area[75] which enables the Treasury to refuse consent to a transfer if tax avoidance is involved. The necessity to obtain the consent of the Capital Issues Committee for increases of capital over £50,000[76] has been similarly utilised to stop tax avoidance transactions. These two provisions were, of course, instituted for purposes other than taxation but they have been used to assist the tax assessor. There are also examples where departmental consent is required only for taxation reasons; one is the provision that superannuation schemes and pension schemes are only valid for various taxation exemptions if they have first been approved by the Inland Revenue.[77] Another is the provision which requires the consent of the Treasury before a company can transfer its residence from inside to outside the U.K.[78]

The method of making the law so wide that it catches all avoiders of a particular type, as well as a number of innocent persons, and relying on the Inland Revenue not to press the claim except in cases where they are satisfied that avoidance has taken place, is a method which is theoretically bad but which has something to commend it in practice. Probably the most striking example of this method is section 46 of the Finance Act, 1940, the extremely obscure section that I mentioned before, which deals with avoidance of estate duty by transfers of companies followed by subsequent benefits to the deceased. It is, I think, generally agreed, that whilst these provisions effectively deal with the type of avoidance which is aimed at, they also may catch a number of transactions of a perfectly innocent character. Assurances have, however, been given by the Inland Revenue that they will not apply the section in such cases.[79] This procedure means that here again the Inland Revenue have the right to say which taxpayer should pay and which should not, a right which used to be thought

[75] Exchange Control Act, 1947.

[76] Control of Borrowing Order, 1947 (No. 945).

[77] F.A., 1921, s. 32, now I.T.A., 1952, s. 379, and F.A., 1947, ss. 20 and 21 (now I.T.A., 1952, ss. 387–388).

[78] F.A., 1951, s. 36, now I.T.A., 1952, s. 468.

[79] See the report of an interview between representatives of the Law Society and the Inland Revenue, when the latter said: "For their part the Inland Revenue would apply the statutory provisions in a reasonable manner." (*Law Society's Gazette* for 1944 at p. 118.)

a prerogative of the House of Commons. In practice, however, this legislation has not worked too badly from a deterrent aspect; the taxpayer who plans an avoidance scheme is advised that the provisions will doubtless be applied if he carries out the scheme in a form which comes within the section, whilst the taxpayer who plans some innocent scheme can fairly be safely advised to take a chance on the Revenue not applying the section.

Another example of legislation, which is too wide but which the Revenue only enforce when they suspect avoidance, is the provision applying surtax to trading companies who do not distribute sufficient dividends.[80] Since "dividend limitation" became government policy the law has not been repealed—merely rarely enforced.

The last method to consider is that of retrospective legislation. So far as avoidance transactions are concerned estate duty legislation is usually retrospective in any event, as it is the law at the date of death that matters and not the law at the date of the avoidance transaction. Hence, indications by the Chancellor of possible future legislation must always be taken to heart by an estate duty avoider who does not propose to die before the next Finance Act takes effect.

A more extreme case of retrospective legislation occurred when the Finance Act, 1950, made payments in consideration of a restrictive trading covenant liable to surtax on their "grossed-up" amounts.[81] Previously, such payments had been treated as capital and not taxable but a warning had been given by the Chancellor that, if this method of avoidance continued, steps would be taken to deal with it. When considerable publicity was given to two cases of payments of this kind, Parliament thought fit to make its provisions retrospective to April 6, 1948, so that payments in these two cases were made liable to tax, although they had not been liable under the law in force when they took place.

This procedure was much criticised at the time and no doubt it is theoretically wrong for a retrospective tax to be imposed. It has, however, established the precedent that serious notice must be taken of warnings issued by a Chancellor of his future intentions, and to that extent no doubt deters avoidance generally.

THE GENERAL PICTURE

Now what general picture emerges from this survey of the methods used to counter tax avoidance?

First of all, we find a basic law of very considerable complexity and obscurity which is interpreted in a literal manner. In that law are a large number of loopholes open to the tax avoider. To a few of these loopholes the test of intention is applied by statute,

[80] See note 63, *supra*.
[81] F.A., 1950, s. 26, now I.T.A., 1952, s. 242.

so that the innocent person gets through the net and the tax avoider is caught, but such provisions are rare and few of the loopholes have any real merits. Some loopholes are today but shadows of their former selves; anti-avoidance legislation has cut a jigsaw pattern across them and placed obstacles in the way so that only a limited number of lucky people can get through and their success rarely depends on their social or economic merits in the community. Other loopholes are still wide open but are only known to the initiated. Sometimes the door leading to a loophole can only be opened by the consent of a Government Department, sometimes the key of the door is kept by the Inland Revenue themselves, and given only to those whom they think to be meritorious.

Some citizens who might otherwise enter for this obstacle race are deterred by fear or uncertainty as to what the law is now, or what it will be or how it will be enforced against them, but a substantial number compete every year for the large prizes offered. These are usually won by those who buy the best advice. Looked on as a game, the practice of tax avoidance is as skilful and entertaining as chess. Although Parliament can alter the rules, the tax avoider has considerable choice in the shape of the board and the number of pieces with which he plays, so that the outcome is often in his favour.

This not very attractive picture of our tax laws is easy to draw; the hard task lies in proposing practical improvements, and I have only a few to offer. Fortunately a Royal Commission is now studying the law of income tax [82] and it is to be hoped that its final report will deal with the problem of tax avoidance and how to stop it. Pending this report I would offer three suggestions for consideration.

(1) That the codification of taxation law be undertaken as a matter of urgency so that the basic law is simplified and more clearly defined and tax avoidance thereby reduced. As soon as the Royal Commission has reported and a decision made on its recommendations, steps should be taken to codify income tax law, and, if possible, assimilate the basis of profits tax to that of income tax. Estate duty law cries out for attention and should be dealt with right away.

(2) That the rule of strict construction of taxing statutes be abolished and that the court of first instance be given wider power to find facts than it has at present. Substance, not form, should be the rule in dealing with facts, and taxing Acts should be construed broadly and not literally. Neither of these proposals involves a great change; an alteration in emphasis is sufficient to exclude many avoidance transactions. To assist this procedure I suggest that the Special

[82] Appointed January 2, 1951. It has already published two interim reports (Cmd. 8761 and 9105).

Commissioners be converted into Tax Judges, with a status at least equal to county court judges, and their numbers increased so as to enable all cases of importance to be dealt with by them instead of by the General Commissioners.

(3) That increased use be made of legislation which takes account of the "intention" of the taxpayer. The basic principles of section 32 of the Finance Act, 1951, which now only applies to Profits Tax, could well be extended to deal with income tax and surtax avoidance arising out of the purchase of trading losses, or of changes in partnerships, or of company and inter-company transactions which are not made at arm's length. If the main or substantial purpose of one of these transactions is tax avoidance, then they should be made ineffective for tax purposes. Similar legislation could be used to deal with artificial transactions to avoid estate duty. It is the man who intends to avoid that should be caught, and a general clause directly aimed at him would deter him very considerably.

I am aware that my second and third proposals are open to criticism on the ground that they may make it more difficult for a taxpayer to be advised as to the taxation effect of any particular proposals. But if substance and not form is to be looked at, and in certain transactions "intention" is to be the deciding factor, the taxpayer will be able to supply the answer himself. He knows, best of all, what is the substance of his transaction and what his intention is. In view of the complexity of existing anti-avoidance provisions there is a strong case for saying that a law based on intention would be easier for the citizen to comprehend.

I should make it clear that I am not putting forward "intention" as the test in every transaction. The ideal is for the law to be stated clearly in a manner which does not permit avoidance or require inquiry as to "intention," and over the greater part of the taxation field this can be done without great difficulty. But in the borderline cases, where a transaction undertaken for genuine commercial reasons ought not to attract tax whilst the same transaction undertaken solely for reasons of tax avoidance should fail in its effect, the best way is to grasp the nettle firmly and say that "substance" and "intention" are to be the deciding factors.

If these three proposals were carried out, I venture to think that tax avoidance would be much curtailed and the respect of the ordinary citizen for our tax laws would be greatly increased. But the main object of this lecture is not to advocate particular reforms but to provoke general discussion of a problem which has so far received little attention except in a very restricted circle.

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THE EFFECT OF A CRIMINAL JUDGMENT ON A CIVIL ACTION*

"CRIMINAL cases are no rule for civil cases." This dictum of Chief Justice De Grey in 1773 [1] may be said to exemplify an aspect of the English law of evidence on which all its historians have remarked, *viz.*, that this law, though based on the doctrine of logical relevancy, nevertheless excludes from time to time, as a matter of policy, facts which are logically relevant and which have an evidential value.[2] The rule which, in general, excludes a criminal judgment from admission in a civil case as evidence of the truth of the matter decided even against one who is a party in both cases is (*pace* the attempts to justify it in logical terms) a rule of policy excluding a fact which, according to the logical processes of reasoning, is of evidential value in the later case. Wigmore [3] has stated that the recognition of the judgment in a later case is not strictly a matter of evidence at all, but rather "the lending of the court's executive aid, on certain terms . . . without investigation of the merit of the fact," for the judicial record is the judgment itself, not merely evidence of it, and whether it will be accepted by the later court will depend upon whether that court is willing (or obliged) to enforce the other court's decision —clearly a matter of policy. Moreover, the English rules of admissibility have not always been kept distinct from those governing conclusiveness or estoppel; and the one set of rules appears to have coloured the other. From the thirteenth century, records of the royal courts operated as an estoppel, at first on the ground that the record, which could not be denied, was itself a mode of proof, but later (by Coke's time) on the ground that the decisions of the courts should be final. Holdsworth [4] has pointed out that the original reason for the estoppel—that the record was itself a mode of proof—explains the further rule that it estops only the parties (for, as between strangers, it was not a mode of proof and could not in consequence, affect their rights). A further limitation upon the scope of operation of a judgment is also apparent from earliest times—that, prima facie, it is conclusive only as to its existence, the court, the parties, the date, the proceedings of the court, their legal effect and its accuracy, but not necessarily of the truth of the matters decided.[5] But, above all, this conclusive operation of a

* Based upon a report written by invitation as a contribution to the proceedings of the Fourth International Congress of Comparative Law held in Paris, 1954.

1 In *Scott* v. *Shepherd* (1773) 2 W.Bl. 892.

2 See, *e.g.*, Holdsworth, *History of English Law*, ix, 128–9.

3 *Evidence*, ss. 1345–6, 1660.

4 *Loc. cit.*, 149.

5 *A fortiori*, the courts do not take judicial notice of a fact merely because it was proved in an earlier case: *Lazard* v. *Midland Bank* [1933] A.C. at p. 298.

judgment applies only where the judgment is itself a fact in issue or is deemed to be relevant to the issue in the later case.[6]

When is a judgment in issue or deemed to be so? A distinction may be drawn between subsequent litigation arising directly out of the former proceedings and litigation independent of those proceedings. In the first type of case, the criminal proceedings are obviously in issue in the later civil proceedings and are therefore admissible, while in the second type they are not in issue and can, therefore, only exceptionally be admissible. Perhaps the most obvious example of the first type of case is where one of the parties attacks the judge of the criminal court, in subsequent civil proceedings. In such proceedings, the criminal judgment is not only admissible, but is conclusive proof of the facts stated therein, and, if, assuming them to be true, they confer jurisdiction on the criminal court, it is an absolute bar to the civil proceedings.[7] In these circumstances, statements in convictions are therefore binding,[8] and one cannot plead that he has been wrongly convicted, while the conviction is still outstanding.[9] A second example of civil proceedings arising directly out of criminal proceedings is where the accused proceeds against the prosecutor in an action for malicious prosecution. In such a case, the plaintiff must produce the record of his acquittal, for no action can be brought for having maliciously set the criminal law in motion, while a conviction against the plaintiff stands unreversed.[10] A conviction, therefore, is taken to show that there was reasonable and probable cause for commencing the prosecution. Where, however, the conviction was reversed on appeal it would seem not to be conclusive, but merely evidence, that the prosecutor had reasonable and probable cause, for the reversal may be taken to negative the inference arising in his favour from the fact on conviction.[11] Moreover, where a prosecutor was successful in *ex parte* proceedings, in which the defendant could not be heard in his own defence (as, for example, in proceedings for binding over to be of good behaviour generally, at common law), the success of the proceedings was no bar to an action for malicious process.

[6] "A judgment is conclusive as against all persons of the existence of the state of things which it actually affects *when the existence of that state is a fact in issue*": *per* Goddard L.J. in *Hollington* v. *Hewthorn* [1943] K.B. 587, 596–7; [1943] 2 All E.R. 35, 41.

[7] *Brittain* v. *Kinnaird* (1819) 1 B. & B. 432; *Mould* v. *Williams* (1844) 5 Q.B. 469. In Canada, it has been decided that a conviction is admissible to prove absence of malice and to prove reasonable and probable cause, on behalf of the court, even where the conviction is defective in form: *McGilvery* v. *Gault* (1879) 19 N.B.R. 217.

[8] *Re Clarke* (1842) 2 Q.B. 619.

[9] *Bynoe* v. *Bank of England* [1902] 1 K.B. 467. Similarly a committal order which has not been reversed is a defence to an action for wrongful arrest: *Turley* v. *Daw* (1906) 94 L.T. 216.

[10] *Huddleston* v. *Asbugg* (1675) Cas.temp.Finch 204; *Basébé* v. *Matthews* (1867) L.R. 2 C.P. 684. In *Justice* v. *Gosling* (1852) 12 C.B. 39 a non-suit of the plaintiff who sued for wrongful arrest and prosecution was held to be a misdirection, even though the plaintiff had been convicted; but the court proceeded upon the understanding that there had been a false charge.

[11] *Quartz Hill Co.* v. *Eyre* (1883) 11 Q.B.D. 674.

Since, however, the defendant may now make his defence in proceedings for binding over to be of good behaviour towards the complainant, no action for malicious process will now lie where an order has been made.[12]

Where civil litigation does not arise thus directly from criminal proceedings, the criminal judgment is in general not merely not conclusive but is inadmissible as evidence of the facts established by it. This rule is subject to exceptions which may be mentioned before an examination of the general exclusory principle. In the first place, there are certain statutory exceptions,[13] the very existence of which demonstrates the general principle to which they are exceptions. At common law, moreover, there are at least four cases in which criminal proceedings may become relevant in civil litigation—(1) a conviction may be admissible to prove character; (2) a plea of guilty may later be adduced as an admission [14]; (3) a conviction based on a judgment declaring a public or general right is admissible in civil litigation, even between third parties; and (4) though judgments in criminal cases are usually treated as *in personam*, a conviction may well end in the confirmation or alteration of a status and to that extent [15] be conclusive. One consequence of accepting a criminal judgment even to this limited extent in civil proceedings is that its admissibility may depend upon the accident of the way in which the case had been decided [16]: a conviction may be admissible where an acquittal would not, for an acquittal does

12 *Everett* v. *Ribbands* [1952] 1 K.B. 112. The inconsistencies in this decision have recently been remarked on by Professor Glanville Williams in 16 M.L.R. 424. The courts did not follow that line of reasoning in the case of applications for affiliation orders. It was decided that, since neither a parish (under 18 Eliz. c. 3) nor a mother (under 7 & 8 Vict. c. 101) had a right of appeal from a dismissal of an application, repeated applications could be made: see *R.* v. *Jenkin* (1736) Cas.temp.Hard. 301; *R.* v. *Machen* (1849) 14 Q.B. 74. But when a right of appeal was given to the mother (by s. 37 (2) of the Criminal Justice Administration Act, 1914), it was none the less held that she retained her right to "reapply": *McGregor* v. *Telford* [1915] 3 K.B. 237.

13 For example, ss. 42–5 of the Offences against the Person Act, 1861.

14 And (notwithstanding the conflict of judicial opinion in America) a plea of guilty would seem none the less to be an admission, even though later retracted. Though it is sometimes stated that the record may be used against the accused, it is not received as a judgment, and, indeed, the judgment on the plea may be inadmissible: see *per* Goddard L.J. in *Hollington* v. *Hewthorn* [1943] K.B. at pp. 599–600. Wigmore rejects "this tweedledum and tweedledee distinction." On the other hand, it has been argued (in 50 Col.L.R. 529) that a plea of guilty upon a charge of a trifling nature may indicate no more than that the defendant did not think it worth his while to defend the charge.

15 It is conclusive only when status is the point in issue. Thus, when a defendant pleads truth in an action for libel charging the commission of a crime, the conviction of the plaintiff is conclusive only as to his status: it is not conclusive on the question of whether he committed the crime and is, indeed, probably inadmissible on that question (see *Helsham* v. *Blackwood* (1851) 11 C.B. 111 and Lord Kenyon's opinion there cited from 3 Esp. 133).

16 Contrast *R.* v. *St. Pancras* (1794) 1 Peake 220 and *R.* v. *Wick St. Lawrence* (1833) 5 B. & Ad. 526.

not ascertain any particular fact.[17] In one type of case, however, an acquittal has been accepted by the courts, *viz.*, in affiliation proceedings. Thus, in *Packer* v. *Clayton*,[18] where the alleged father sought to rely on his acquittal upon a charge of a sexual offence against the mother as conclusive evidence that he was not guilty of the alleged sexual intercourse, the court was content to negative the claim that such evidence was conclusive.[19] A conviction in such circumstances has been said to be "presumptive proof of the commission of the crime."[20] But it cannot be too clearly emphasised that the occasions upon which a criminal judgment has been used in civil proceedings are regarded as exceptional and, whatever the historical vicissitudes through which it has passed, the general rule today is undoubtedly that which excludes a criminal judgment as evidence of the truth of the facts decided by it. "In truth," said Goddard L.J., on behalf of the Court of Appeal in *Hollington* v. *Hewthorn*,[21] "the conviction is only proof that another court considered that the defendant was guilty." The conviction was therefore held to have been rightly rejected "both on principle and authority," and it is proposed here to examine first the authorities and then the principles upon which this conclusion was reached.

In *Hollington* v. *Hewthorn* (*supra*), the court put in the forefront of its judgment the fact that the judges had in practice, for at least a generation, rejected records of convictions in civil proceedings, and that such *communis opinio* is evidence of what the law is. But the courts do not appear always to have been of the same opinion, and in 1736 Lord Hardwicke[22] expressed his opinion that "this is a pretty tender thing." As a matter of history, the interpretation of the decisions is rendered difficult by the fact that the issues are rarely clear-cut. Several factors have contributed to this

[17] In *Virgo* v. *Virgo* (1893) 69 L.T. 460, a certificate of acquittal of rape was not admitted to disprove the rape in the Divorce Court. The effect of an acquittal in a foreign court was raised but inconclusively dealt with in *R.* v. *Aughet* (1918) 13 Cr.App.R. 101. The rule rejecting an acquittal applies equally to a conviction which is followed by a discharge (either conditional or unconditional) or by probation, for a certificate of conviction cannot be issued, nor can the conviction be employed in any other proceedings (*R.* v. *Harris* [1951] 1 K.B. 107), save where it is an essential part of a later charge.

[18] (1932) 97 J.P. 14.

[19] Avory J. thought it "perfectly legitimate for the justices to take into account the fact that the evidence given by the girl did not convince the jury," while du Parcq J. emphasised the converse point that the justices should not hesitate to find for the mother "merely because another tribunal came to a different conclusion." Lord Hewart C.J. considered that "the case must be heard free from any prejudice introduced by the Assize case." The decision of the Irish High Court in *O'Donnell* v. *Hegarty* [1941] I.R. 538 goes no further than *Packer* v. *Clayton*, being concerned, not with admissibility, but with conclusiveness.

[20] *Per* Ridley J. in *Mash* v. *Darley* [1914] 1 K.B. 1. On appeal, it was held that the conviction had not been properly proved, and Phillimore L.J. remarked on the difficulty of receiving the conviction as corroboration ([1914] 3 K.B. 1226).

[21] [1943] K.B. 587, 594. Hilbery J. at first instance rejected the conviction as *res inter alios acta* ([1943] 1 K.B. 27, 29).

[22] In *Gibson* v. *McCarty* (1736) Cas.temp.Hard. 311.

result. In the first place, the question of conclusiveness and that of admissibility have often been taken together, with the result that, even though the two questions are not necessarily confused,[23] the court has concentrated upon the question of conclusiveness, and, after answering that question in the negative, has then almost casually expressed (or perhaps no more than implied) some rule as to admissibility.[24] In the second place, many of the earlier decisions appear to depend upon a consideration of the relative standing of the different types of court involved. Thus, an ecclesiastical court could be bound by a conviction of felony,[25] though, after initial support had been given to this rule of conclusiveness,[26] the ecclesiastical courts modified it to one of admissibility,[27] and the matrimonial court eventually refused even to admit such evidence.[28] In the third place, many of the cases are expressly founded on rules of evidence now extinct, with the result that it is almost impossible to determine the extent, if any, to which the court was willing to subscribe to other reasons which would still be valid today. The point is remarked upon by Parke B. in *Blakemore* v. *Glamorganshire Canal Co.*[29]: "There are dicta of very learned judges at Nisi Prius, in cases in which, when they are very properly rejecting records which are inadmissible, on the principle of *res inter alios acta*, they assign one reason which exists in the particular case, instead of relying on the general rule." Such cases raise the question whether the principle stated by Parke B. is the general rule. An instance of this type of difficulty is seen in the decisions which appear to depend upon the former rule that a party could not give evidence, so that, where a conviction has been obtained by a party's evidence, that conviction could not be adduced in support of his case in the civil proceedings, "for what cannot be evidence directly,

[23] That they have occasionally been confused is seen in Sir John Nicoll's comment in *Wilkinson* v. *Gordon* (1824) 2 Addams 152, 160, to the effect that, when Gilbert in his *Law of Evidence* states that a conviction of bigamy of a deceased "cannot be given in evidence" on his second wife's claim to dower, he means "conclusively given."

[24] *Petrie* v. *Nuttall* (1856) 11 Ex. 569; *cf. Hart* v. *M'Namara* (1817) 4 Price 154, n. 4; *Helsham* v. *Blackwood* (1851) 11 C.B. 111. A modern instance is to be found in the judgment of Lord Alverstone C.J. in *Taylor* v. *Wilson* (1911) 106 L.T. 44. Wigmore, *Evidence*, s. 1671a, remarks that the distinction between admissibility and estoppel is one that is "not commonly emphasised nor readily grasped."

[25] As in proceedings for the deprivation of a parson: *Searle's* case. But in a claim for dower a conviction of bigamy would not be binding, for the question whether a marriage is lawful is for the ecclesiastical courts "and is not decided at common law": Gilbert, *Evidence* (6th ed.), p. 28.

[26] *Boyle's Case* (1688) 3 Mod. 164, Comb. 72. Such decisions are possibly the reason for the statement in Buller's N.P. (7th ed.), p. 245, that a conviction is conclusive.

[27] *Sir George Bromley's Case* (1793); *Wilkinson* v. *Gordon* (*supra*, n. 23).

[28] *Marsh* v. *Marsh* (1858) 28 L.J. (P. & M.) 30. In modern domestic and other statutory bodies exercising judicial and quasi-judicial functions, the admissibility and effect of a conviction will depend upon the statutory provisions relating to the tribunal, and, possibly, in turn, upon the rules of procedure laid down for or by the tribunal: see *G. M. C.* v. *Spackman* [1943] A.C. 627.

[29] (1835) 2 Cr.M. & R. 133.

cannot be made evidence by such circuity." [30] Doubt was cast upon the conclusion that this rule of evidence was the real reason for rejecting records of conviction [31] and eventually in *Hollington* v. *Hewthorn* (*supra*) it is denounced as a minor factor. Further instances of the rules of evidence operating as factors contributing to the indeterminancy of *rationes decidendi* are seen where a party seeks to use a conviction for a particular purpose,[32] or where the question debated is whether a conviction may be used as corroboration.[33] Finally, there are cases in which procedural errors [34] or failures of proof [35] or limitations imposed by statute [36] render the decision inconclusive on the question of admissibility.

When these "problem cases" are removed, what support is there for the proposition in *Hollington* v. *Hewthorn* (*supra*) that exclusion of convictions rests on authority? There is certainly authority to the contrary. Thus, in *Lady Ivy's Trial* [37] it is said that a conviction for procuring perjury is evidence of the falsity of the deed forged. In *Blakemore* v. *Glamorganshire Canal Co.*[38] a former verdict is used in civil proceedings. Other nineteenth-century cases are reported, but may be explained on particular grounds as above.[39] The strongest authority to the contrary is the decision of Evans P. in *Re Crippen* [40] that "where the convicted felon . . . brings any civil proceedings to establish claims, or to

[30] Gilbert, *Law of Evidence*, citing 2 Sid. 325. Several cases in which convictions are excluded proceed upon this ground (*e.g.*, *Gibson* v. *McCarty* (1736) Cas.temp.Hard. 311; *R.* v. *Horton* (1817) 4 Price 150), and on this ground alone (*e.g.*, *Burden* v. *Browning* (1809) 1 Taunt. 520; *Smith* v. *Rummens* (1807) 1 Camp. 9; *Hathaway* v. *Barrow* (1807) 1 Camp. 151), the implication being that where the conviction was obtained by other evidence it is admissible. Where it was obtained partly by the party's and partly by other evidence, though Gilbert rejects it as "tainted," it was accepted in *Davis* v. *Nest* (1833) 6 C. & P. 167, 173, on the ground that if it were rejected "the plaintiff would only have to make a defendant of the person on whose evidence the party was convicted, and then he would exclude the defence."

[31] Even Gilbert says it is to be taken "with great restriction."

[32] *Eaton* v. *Swansea Waterworks Co.* (1851) 17 Q.B. 267. It is not always clear whether a decision on "admissibility for a purpose" may be regarded as a decision on the question of general admissibility.

[33] As in *Mash* v. *Darley* [1914] 3 K.B. 1226 (*supra*, n. 20).

[34] *Helsham* v. *Blackwood* (1851) 11 C.B. 111; *Leyman* v. *Latimer* (1878) L.R. 3 Ex.Div. 352; *Mash* v. *Darley* [1914] 3 K.B. 1226.

[35] *Thomas* v. *Russell* (1854) 9 Ex. 764.

[36] As under the Army Act. *Re Crippen* [1911] P. 108 has been said to be limited to the terms of the statute under which the court gave its decision: *sed quaere* (*vide infra*, n. 42).

[37] *Mossam* v. *Ivy* (1684) 10 St.Tr. 555, 627.

[38] (1835) 2 Cr.M. & R. 133.

[39] In *Davis* v. *Nest* (n. 30) the case arose out of forfeiture proceedings and is entangled in the rule excluding a party's evidence. *Helsham* v. *Blackwood* (n. 34) and *Thomas* v. *Russell* (n. 35) are inconclusive, but in the former it appears to have been assumed that a conviction is admissible, while in the latter there is a dictum of Pollock C.B. to that effect. In *Eaton* v. *Swansea Waterworks Co.* (n. 32) the conviction was admitted, but for the sole purpose of establishing the fact that the convicted person must have realised that he could not claim to perform the penalised act as of right.

[40] [1911] P. 108, 115.

enforce rights, which result to the felon . . . from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime." The learned president thereupon held that a murderer's conviction of the murder of his wife was a special circumstance [41] justifying him in refusing to allow the murderer's executrix to act as administratrix of the estate of the murdered person. It is suggested in *Hollington* v. *Hewthorn* (*supra*) that "the only point that was actually decided was that the fact that the husband was a convicted felon was a sufficient special circumstance," but this cannot be so, for the fact that he was a convicted felon is material only provided it was his wife whom he murdered,[42] so that if the conviction had been inadmissible the President could have had no "special circumstance" on which to exercise his discretion. It must now be said, however, that although *Re Crippen* correctly decides that the conviction is conclusive as to the husband's status as a felon, the view there expressed that the conviction can be used to prove that he was a felon who murdered his wife has been overruled by *Hollington* v. *Hewthorn*, in which it is stated that *Re Crippen* and the two later cases in which it was followed in the Divorce Court,[43] "go beyond and are contrary to the authorities and ought not to be followed in the future" (at p. 601). The authority in favour of the conclusion ultimately reached in the Court of Appeal stretches back at least to a dictum of Holt C.J. in *R.* v. *Whiting* [44] and to the decision in *R.* v. *Warden of the Fleet* [45] supported by that in *Gibson* v. *McCarty*.[46] Other authorities in the nineteenth century were based on one or more of the particular reasons set out above. In addition, two dicta were frequently cited: that of Blackburn J. in the House of Lords in *Castrique* v. *Imrie* [47] and that of Bramwell L.J. in the Court of Appeal in *Leyman* v. *Latimer*.[48] A decision in the Chancery Court of Lancaster [49] in

[41] Within s. 3 of the Court of Probate Act, 1857.

[42] See Dr. Goodhart's note in 59 L.Q.R. 299-300.

[43] In *Partington* v. *Partington & Atkinson* [1925] P. 34 and in *O'Toole* v. *O'Toole* (1926) 42 T.L.R. 245. In *Hollington* v. *Hewthorn* (*supra*) Goddard L.J. suggests that "Hill J. obviously had considerable doubt on the matter," but Hill J.'s doubts appear to be solely on the ground that *Partington's* case was "difficult to reconcile with a passage from Stephen" (*Evidence*, Art. 42): but he resolved those doubts against Stephen.

[44] (1698) 1 Salk. 289.

[45] (1698) 12 Mod. 337; Holt K.B. 133.

[46] (1736) Cas.temp.Hard. 311. It is of note that counsel arguing for the admission of the conviction in *Hollington* v. *Hewthorn* (*supra*) could say no more of these cases than that "12 Mod. is not a book of any authority" (see 1 Doug. 79, 83) and that *Gibson* v. *McCarty* had not been considered in the books.

[47] (1870) L.R. 4 H.L. 414, 434.

[48] (1878) L.R. 3 Ex.D. 352. In *Re Crippen* (*supra*) Evans P. "ventured to doubt whether the authorities supported Lord Bramwell's proposition."

[49] *Yates* v. *Kyffin-Taylor* [1899] W.N., p. 141, rejecting, in an action against a legatee by the executors, a certificate of the legatee's conviction of the murder of the testatrix.

1899 concluded the authorities prior to *Hollington* v. *Hewthorn*, in which in 1943 the Court of Appeal, decisively rejecting all authority to the contrary, roundly declared that in such circumstances a conviction is "rightly rejected."

It will be remembered that this conclusion was stated to be reached not only on authority, but also on principle. It is, therefore, proposed to examine the reasons which have been advanced for the rejection of criminal judgments in civil proceedings. Some seven reasons appear to have been advanced.

(1) As shown above, many early cases are stated to be decided upon the principle that an admission of evidence of a conviction would circumvent the rule excluding the party's testimony. Indeed, counsel for the plaintiff in *Hollington* v. *Hewthorn* (*supra*) suggested that all rejections of convictions could be attributed to this one cause, but the court preferred the view that such decisions merely assigned this one reason, as it was to hand, instead of relying on a more general principle, which was none the less implied.[50]

(2) It is sometimes said that such evidence must be rejected as hearsay, in that the judge's or jury's conclusions are based upon the testimony at the trial, so that they would be prevented from testifying in the civil proceedings because of their lack of personal knowledge. If this be so,[51] it is no answer to this objection to say, as Wigmore does,[52] that the hearsay rule is "no more than could be urged against the inquisitions already used at common law."

(3) The reason perhaps most frequently heard is that contained in the maxim *res inter alios acta alteri nocere non debet*. The parties are different because the Crown is the prosecutor in the criminal proceedings. Formerly, the record operated as between the parties only, because it was itself a mode of proof; and this principle remained notwithstanding the change to the doctrine that judgments operated on the principle that there ought to be an end to litigation, and it was taken over from cases of estoppel to cases of admissibility. The ground upon which the maxim is applied is simply one of hardship[53]—that a judgment should not affect one who could not appear, defend his case, cross-examine his opponent's witnesses, appeal if defeated or (formerly) attaint the jury. But though this might explain why a conviction should not be conclusive, it is not a reason against admissibility. It has, moreover, been argued that the plea of hardship has been over-stressed, in that the other party frequently had an opportunity of being in court during

[50] Reliance was placed on the dictum of Parke B. in *Blackmore* v. *Glamorganshire Canal Co.* (n. 29): see Smith's *Leading Cases* (ii, 668).

[51] It is so argued by Professor Hinton in (1932) 17 Illinois L.R. 195, but is denied in Phipson's *Evidence* in which the learned editor rejects hearsay as a reason, on the ground that, if it were, the judge would be able to pronounce and prove his judgment.

[52] *Evidence*, s. 1671a.

[53] See the judgment of De Grey C.J. in the *Duchess of Kingston's Case* (1776) 20 How.St.Tr. 538.

the criminal proceedings, and, in any event, this reason never prevents the use of a hearsay official report which is otherwise admissible.[54] There are, however, innumerable dicta accepting the reason.[55] It was accepted by Hilbery J. at first instance, in *Hollington* v. *Hewthorn* (*supra*), but the Court of Appeal remarked that it is difficult for a layman to understand this when the *alios* means the Crown and the Crown is only the nominal prosecutor. That the Crown may be only "technically and nominally" the prosecutor was remarked on by Sir John Nicoll in 1824[56] and, indeed, where the private prosecutor is a party to the civil proceedings, the parties may be virtually the same in the two cases. Yet the common law has tended to emphasise the fact that the private prosecutor is not a party to the prosecution[57] and has moreover been ready to accept a duality of status or capacity as conferring on one and the same man two separate personalities, so that a judgment against him in one capacity will not estop him if he sues in another capacity.[58] If, however, the Crown were successfully to prosecute for the dangerous driving of a vehicle which had collided with a public vehicle, injuring a Crown servant, and this prosecution were followed by an action brought against the convicted driver by the Crown for damages for the injury to its servant, the conviction would not be *res inter alios acta* in the civil proceedings, unless the Crown were regarded as proceeding in two separate capacities conferring on it separate legal personalities.[59]

(4) Lack of mutuality is a reason (for rejecting a conviction) which was much relied on in the past. It is derived from the doctrine of estoppel and is attributable to the fact that the record bound only the parties, because it was originally a mode of proof. It arises also from the fact that the parties in the two proceedings are not identical and it may thus be regarded as a branch of the

[54] Wigmore, *Evidence*, s. 1671a.

[55] See, *e.g.*, *Hillyard* v. *Grantham*, cited in *Gibson* v. *McCarty* (1736) Cas. temp.Hard. 311; *Hart* v. *M'Namara* (1817) 4 Price 154, n. 4; *Blakemore* v. *Glamorganshire Canal Co.* (n. 29), above, where Parke B. declared this to be "the general rule"; *cf. Leyman* v. *Latimer* (1878) L.R. 3 Ex.D. 352; *R.* v. *Hutchings* (1881) 6 Q.B.D. 300, 304.

[56] In *Wilkinson* v. *Gordon* (1824) 2 Addams 152.

[57] For example, he has always a competent witness, as the proceedings were not *his* proceedings.

[58] See *Re Deeley's Patent* [1895] 1 Ch. 687; *Marginson* v. *Blackburn Borough Council* [1939] 2 K.B. 426. Conversely, an estoppel may operate on the ground that two "persons" are identified as one: for example, an Exchequer condemnation on the prosecution of the King estopped in proceedings for a penalty brought by the Attorney-General, on the ground (*inter alia*) that the King and the Attorney-General were for this purpose one.

[59] This question does not appear to have arisen in the English courts. It is said in *Metters* v. *Brown* (1863) 1 H. & C. 686, that "whenever a person sues, not in his own right, but in the right of another, he must for the purpose of estoppel be deemed a stranger"; but it would be necessary for the Crown, in the hypothetical case stated above, to take this one step further and show that in pursuing the one "right" the Crown is to be deemed a stranger to the Crown pursuing another "right." It may be remarked that otherwise the conviction would at most be admissible, not conclusive.

rule that for an estoppel the parties must be the same.[60] But the lack of mutuality arises primarily from the fact that acquittals are inadmissible, for the double reason that the acquittal ascertains no fact, and (since an acquittal may result from a failure of the prosecution to prove the crime beyond reasonable doubt) the acquittal is no argument that the fact was not true. Thus in the later civil proceedings it is theoretically possible to find against the accused person without finding that the jury in the criminal proceedings were wrong.[61] Lack of mutuality was relied on in cases as far apart as 1698 and 1907,[62] but it has recently been suggested [63] that this argument is "not very convincing." There would in fact seem to be no reason why the parties should be placed on the same footing, where one has been convicted, for the person convicted has "had his day in court" and has lost the case in circumstances most favourable to himself.[64] Gilbert, however, would prevent the other party from giving the judgment in evidence on the ground of prejudice, for "the letting in of pre-judgments supposes that the cause has already been decided, and that it is not tried and debated as new matter, but as the effect of some litigiousness in defendant."

(5) A reason frequently remarked on is that civil and criminal trials are different. The purposes, the object, the issues, the procedure and the rules of evidence all differ. In particular, the defendant cannot be made to testify in criminal proceedings and no inference can automatically be drawn from his failure to do so, whereas in a civil case his opponent may use him as a witness. And there is the difference in the two standards of proof. But it may be remarked that mere differences in the two procedures are not necessarily relevant differences, and the two mentioned above are, in any event, in favour of the person convicted and should, therefore, be adduced as reasons for admitting the conviction. It has been suggested that reasons based upon these distinctions are "weak and outdated" by reason of the disappearance of many of the substantial distinctions between the two proceedings, by mere lapse of time.

(6) The reason relied on in *Hollington* v. *Hewthorn* (*supra*) is that the conviction is irrelevant, as opinion. The opinion of the criminal court is legally irrelevant, as it is of no more importance than the opinion of a bystander upon the question of whether either

[60] See counsel in *R.* v. *Fontaine Moreau* (1848) 11 Q.B. 1028.

[61] In *O'Donnell* v. *Hegarty* [1941] I.R. 538 a person acquitted on a charge of unlawful carnal knowledge of a girl within age could not rely on that acquittal in affiliation proceedings arising out of the same alleged intercourse. It was pointed out by Black J. that the acquittal proved nothing, since, *e.g.*, the jury might have acquitted on the ground that they rejected the evidence relating to the girl's age.

[62] In *R.* v. *Warden of the Fleet* (1698) 12 Mod. 337 and by Farwell J. in *Caine* v. *Palace Shipping Co.* [1907] 1 K.B. 670, 683.

[63] By Professor Hinton, *loc. cit.*, n. 51, above.

[64] See Wigmore, *Evidence*, Vol. V, p. 691.

side is to blame. It has been stated by Wigmore [65] that the opinion rule is "not intrinsically applicable here," though no reason is given in support of this statement; but it may be remarked that logical relevance is not necessarily a final test in the law of evidence.[66] But the rejection of a conviction in civil proceedings as mere opinion is not without earlier authority.[67]

(7) In addition to the above principles, there are certain practical grounds on which, it has been said, convictions are to be rejected. In the first place, the court trying the civil case can get no guidance from the criminal case without re-trying the criminal case.[68] Looked at from another angle, this is to say that the jury are being given an impossible task, since they have no way of determining the value of a conviction: they must either blindly accept or ignore it.[69] A further practical reason advanced for ignoring the conviction is that its admission "might induce a superficial or scant proferring of evidence in the present case."[70] This reason must remain somewhat speculative and it might equally be argued that, were convictions admissible, more care would be taken in criminal proceedings, so that it could no longer be argued [71] that convictions should be inadmissible because criminal proceedings may be allowed to go by default.

The question remains whether the rule rejecting convictions applies in all types of civil proceedings no matter who the parties or what the subject-matter. Sir John Nicoll [72] distinguished between a personal suit founded immediately on the offence and "a civil cause upon a mere question of property." Evans P.[73] was prepared to distinguish, if necessary, between proceedings in which the convicted person was a party pursuing the fruits of his crime and other proceedings. It is submitted, however, that this distinction is questionable and that the opinion of Dr. Goodhart [74] is to be preferred, that "it cannot matter that the convicted person is or is not one of the parties to the suit." Dr. Goodhart has himself suggested a ground upon which judgments might be classified, *viz.*, those in which the decision is based upon the evidence of the parties (and which do not necessarily purport to establish the truth) and

[65] *Evidence*, s. 1671a.
[66] For example, where a party's character is not in issue, proof of his conviction may be excluded as a matter of policy, though logically relevant.
[67] For example, Lord Denman C.J. in *R.* v. *Fontaine Moreau* (1848) 11 Q.B. 1028, rejected a civil decision as mere opinion in a criminal case.
[68] *Hollington* v. *Hewthorn* [1943] K.B. 587, 601.
[69] Professor Hinton, *loc. cit.*, Wigmore's reply that this is no more than a general attack upon juries does not appear to meet the objection.
[70] Wigmore, *Evidence*, s. 1671a.
[71] As was argued in 50 Col.L.R. 529.
[72] In *Wilkinson* v. *Gordon* (1824) 2 Addams 152.
[73] In *Re Crippen* [1911] P. 108. The distinction is accepted in Halsbury's *Laws of England* (Hailsham ed.), xiii, 686, n. (*a*), and the same view was taken in the American courts in *Walther* v. *News Syndicate Co.* (see 50 Col.L.R. 529).
[74] 42 L.Q.R. 145; this opinion finds support in 50 Col.L.R. 529.

those in which the State has an interest and the decision is not confined to evidence given by the parties (in which case we ought to assume that they establish the truth). In *Hollington* v. *Hewthorn*, however, the court regarded this distinction as "debatable" and one which would, in any event, require legislation. Prima facie, therefore, the rule enunciated in *Hollington* v. *Hewthorn* applies equally whether a plaintiff or defendant is relying on a conviction or acquittal and whether the plaintiff or defendant was the accused or no.

It remains briefly to note the reasons which have been advanced against the inadmissibility of convictions, which reasons have now been rejected by the English courts. They are injustice, inconvenience and illogicality. In the first place it was pointed out by counsel in *Hollington* v. *Hewthorn* that the rejection of the conviction might lead to injustice by virtue of the fact that, since the victim of a felony cannot proceed civilly until the felon has been prosecuted, a person thus delayed might be injured unless he could rely on the conviction, in that his principal witness might have died during the period which was one of forced inactivity on the part of the injured party, so far as civil litigation was concerned.[75] The inconvenience of the present rule was admitted by Goddard L.J. in *Hollington* v. *Hewthorn*. More recently, in *Carnill* v. *Rowland*,[76] Lord Goddard C.J. has remarked upon the inconvenience which arises where a person is charged with driving a motor vehicle without insurance "cover," for the case has to be decided in the absence of the persons most concerned—the insurers. For this reason, the court gave its blessing to the extra-legal procedure by which the police, before prosecuting, inquire of the insurers whether they regard themselves to be "on risk." The illogicality of the present rule may be seen in two aspects. First, there are many investigatory processes whose stature is not that of the criminal courts yet whose conclusions are admissible. And, secondly, there is the "practical" illogicality, stressed by Dr. Goodhart,[77] that what is barred at the front is let in at the back door; for if the party gives evidence the conviction can at once be admitted, under the Criminal Procedure Act, 1865, in which case the jury will undoubtedly treat it as evidence of guilt.[78]

[75] It is sometimes further said that the rule is unjust because it permits the wrongdoer to profit from his own wrong. This, however, begs the question. Thus, where it was argued that an assured who set fire to his own house should not recover, the court replied: "We quite agree. But the fact that the assured did set the fire cannot be assumed: it must be proved; and that proof must be of such form and character as the rules of evidence require": *Girard* v. *Vermont, etc., Co.* (1931) 103 Vt. 333. Moreover, there is the possibility of injustice on the other side, for where an owner of a vehicle, who was not the driver at the time of the collision, is joined as a defendant in a civil action arising out of the collision, the introduction of the driver's conviction might be said to prejudice him unfairly.

[76] [1953] 1 W.L.R. 380.

[77] 59 L.Q.R. 301.

[78] *Cf.* the complaint of Holt C.J. in *R.* v. *Whiting* (1698) 1 Salk. 283, that though the conviction is inadmissible "yet we are sure to hear of it to

It is not, perhaps, surprising that suggestions have been made that the strict standard of exclusion established in the English courts is open to criticism; and it has been stated that the trends in America have been towards a relaxation of this strict standard.[79] A recent Scottish critic [80] of the English rule has suggested that there is no reason why the victim of a traffic or industrial accident should not be made a party to criminal proceedings arising thereout, so that civil liabilities and damages might be assessed in those proceedings. In England, however, *Hollington* v. *Hewthorn* stands where it did, unless a (perhaps unguarded) statement in *Carnill* v. *Rowland* [81] may eventually be taken to modify the position. There, it was stated that if a criminal court "gives a decision on the construction of the policy (of insurance) . . . *that decision may have some persuasive effect*." This is equivocal, in that it may mean some persuasive effect upon the insurers when they are debating whether to pay, or on the assured when he is debating whether to claim, or it may mean some persuasive effect when the claim is made and resisted and is before a court. Possibly, the first of these alternatives was intended, in that the words italicised above are followed by the statement that the decision "is in no way binding between the insurance company and the assured." [82] But if the Bench, whose constant complaint is that of overwork, ever determine to modify the present strict standard of exclusion, with its inevitable repetitious proceedings and occasional injustice, a theoretical ground for the acceptance of convictions as evidence in civil proceedings is, as Dr. Goodhart has pointed out,[83] ready at hand: it is *omnia praesumuntur rite esse acta*.[84]

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influence the jury." It may be supposed that where a conviction is admitted, exceptionally, for a particular purpose, as in *Eaton* v. *Swansea Waterworks Co.* (1851) 17 Q.B. 267, the jury will not in fact confine its effect upon their minds to the purpose for which it was admitted, but will treat it as evidence of guilt.

79 See 50 Col.L.R. 502; *cf.* Wigmore, *Evidence*, ss. 1346a, 1660, 1671a, where it is stated that the judicial arguments in favour of the admission of convictions are "convincingly presented."

80 Lord Cooper in 2 J.S.P.T.L.(N.S.), p. 98.

81 [1953] 1 W.L.R. 380.

82 It is, however, to be noted that Lord Goddard says no more than that the conviction "would not *debar or bind* the accused . . . if he . . . chose to bring an action" (italics added).

83 42 L.Q.R. 144. It may be remarked that even where a conviction is otherwise admissible and relevant, public policy may prevent the basing of an action upon it: *e.g.*, if a master is convicted and fined on account of his servant's act, he cannot, by proving his conviction and payment of the fine, recover this amount from the servant (though he may recover from the servant damages already recovered from him on account of the servant's wrongful act: *Green* v. *New River Co.* (1792) 2 T.R. 589).

84 It has, of course, been assumed throughout this paper that the criminal judgment in question is unimpeachable, that it is final, on the merits, with jurisdiction (and stated to be such in the case of a conviction by a magistrate) and not fraudulent (for a judgment *in personam*) nor collusive (for a judgment *in rem*): see Smith's *Leading Cases*, ii, 754.

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THE AMERICAN ANTITRUST LAWS

When the U.S. Congress passed its first " antitrust " law—the Sherman Act—in 1890, American business became subject to a governmentally enforced policy of competition. Sixty-five years later, that Act is still the central core of American economic philosophy. No major political party would think of attacking it directly. Protection of competition is the accepted policy. If exceptions are to be made, the burden of proof is on those who would make them. Indeed, exceptions are rarely called exceptions unless their nature is clear. They usually travel under the happier labels of " fair competition," " rational competition," and the like.

Exceptions have certainly been made. Many industries are regulated as monopolies or near monopolies; wages may be set by collective bargaining; farm prices receive governmental support; and resale price maintenance is broadly permitted in the field of distribution.

Nevertheless, despite exceptions, uneven enforcement, and wavering judicial attitudes, the antitrust laws have played a strong and pervasive role in the development of the American economy.

I shall try here to give in broad outline what that role has been, by summarising what the antitrust laws are, what effects they have wrought, and what unresolved problems and issues of policy are particularly important to their future course. I should state, as a note of caution, that I have omitted many qualifications and refinements of the subject, possibly some important ones; and that many of the conclusions being matters of opinion, the opinions expressed are my own.

I—The Antitrust Laws

Introduction

The basic premise of the American antitrust laws is that proper allocation of economic resources, efficiency, high quality, low prices, and new developments will best be promoted by the more or less automatic mechanism of competitive markets. Regulation of economic activity is not to be left in private hands, even though at times private regulation might seem to be consistent with the public interest. Hence the law is directed against any substantial interference with the free play of competitive pressures, not merely against interference which produces bad results.

Limitations on competition may be due to specific actions—agreements among competitors, predatory tactics, and restrictive

practices in general. They may also be inherent in the structure of a market itself, as when one firm or a small group of firms is so dominant as to have extensive control over price, output, and entry of new firms. The antitrust laws are designed to deal with both conditions—restraints and undue market power.

The Sherman Act condemns restraint of trade and monopolisation in extremely broad terms. Section 1 of the Act makes illegal "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several States, or with foreign nations." Section 2 makes it illegal for any person or corporation to "monopolise, attempt to monopolise, or combine or conspire . . . to monopolise any part of the trade or commerce among the several States, or with foreign nations." Violations are punishable by criminal proceedings, or the Government may proceed in a civil suit and obtain broad equitable relief appropriate to the violation.[1]

Of course, the term "every" in section 1 does not really mean "every." In the landmark *Standard Oil* case of 1911, which blocked out the basic interpretations of the Sherman Act, the Supreme Court held that the Act proscribed only *undue* limitations on competitive conditions, and that the "rule of reason" would be applied in determining whether or not a particular restraint or degree of market power was within the scope of the Act.[2] However, "reason" is applied only within carefully defined limits. The rule may not be used as a performance test to separate good actors from bad, or benign monopolies from predatory ones. Instead, it means merely that a court will assess the nature and effect of a restraint or of market power in order to determine whether it is in fact an undue limitation on such critical competitive decisions as price, output, and entry.

Restraint of Trade under the Sherman Act

The law on restraints of trade has become reasonably clear and well-defined. Certain kinds of restraint so manifestly interfere with key market decisions that they are conclusively presumed to be illegal. Except for resale price maintenance agreements, which are protected by other legislation to be discussed below, price-fixing agreements are simply illegal *per se*. No inquiry into the nature of the conditions which produced the agreement, or into the reasonableness of the prices fixed, will be permitted.

Where the agreement is not a price-fixing agreement on its face, considerable inquiry may be necessary to determine whether

[1] In addition, any private person injured by a violation of the Sherman Act, or of other antitrust laws, may sue for and recover treble damages. Such private actions were of relatively minor consequence for many years, but in the past decade they have become more frequent, more successful (with some recoveries in excess of $1,000,000), and a risk seriously to be reckoned with by prospective violators.

[2] *Standard Oil Co. of New Jersey* v. *United States* (1911) 221 U.S. 1.

or not a substantial impact on price is intended or will result. But once such an impact is found, subtle forms of tampering with price will be condemned with the rest. In one case,[3] the Supreme Court struck down as price-fixing a plan whereby large integrated petroleum companies, whose wholesale sales of their own gasoline were largely on a contract basis, made daily purchases of "distress" gasoline from independent refiners, who sold largely on the "spot" market. The purchase of "distress" gasoline prevented it from being dumped on the "spot" market and from depressing not only the market prices on spot sales but also the contract prices on the large companies' own sales, since the contract prices were usually tied to the "spot" market prices. Thus, said the court, the purpose and effect of the plan was to put a floor under price, and this could not be done:

> "Any combination which tampers with price structure is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilised prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defence to price-fixing conspiracies."

Starting from this premise, the courts have frequently condemned concerted trade association activities affecting price. Trade associations do have leeway. They perform some useful functions which have no necessary antitrust significance. As clearing-houses for technical information, general market data, and the like, they may well benefit the smaller firms in an industry and improve, rather than worsen, the industry's competitive performance. However, any such organised vehicles for intercommunication can readily be utilised for less estimable purposes, and American courts have by and large been prone to view with deep suspicion any activities likely to affect price. They have often struck down the concerted adoption of, and adherence to, such formulatory price policies as "basing point" and "zone price" systems. They have also criticised "open price" systems, in which all sellers agree not to make any sales at other than their published prices. The courts have usually recognised that in real-life markets, particularly where sellers are few, much of what competition there is depends on uncertainty as to what competing sellers are doing or will do, and that "open price" and systematic price policies may be used to repress price competition by eliminating uncertainty.

[3] *United States* v. *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

The " conclusive presumption " of illegality applied to price-fixing has also been attached, or clearly would be attached, to market-sharing agreements and group boycotts. Market-sharing is but an ill-concealed device for eliminating price and other forms of competition. Similarly, group boycotts against competing products, against " price cutters," or against non-co-operating distributors, obviously interfere with the workings of the competitive process.

As for other restraints of less certain nature or effect, the law cannot be quickly summarised and I shall not try to cover it fully. Instead I shall discuss briefly certain practices dealt with specifically by the Clayton Act, which was passed in 1914 as a supplement to the Sherman Act; the Robinson-Patman Act of 1936, passed as an amendment of the Clayton Act; and the Miller-Tydings and McGuire Acts, dealing with resale price maintenance.

Restraint of Trade under Other Statutes

One of the purposes of the Clayton Act was to impose more severe limitations than those of section 1 of the Sherman Act on certain practices which the Congress thought were inconsistent with competition in their character, or particularly dangerous to it in their cumulative effect. With regard to these practices, the test of illegality is not whether they presently constitute an undue restraint of trade or monopolisation—the Sherman Act test—but whether their present or future effects " may be to substantially lessen competition or to tend to create a monopoly in any line of commerce."

Section 3 of the Act subjects to this test any lease, sale or contract of sale of goods, whether patented or unpatented, on the condition or understanding that the lessee or purchaser shall not use or deal in the goods of competitors of the lessor or seller. The business practices covered include what are commonly known as tying arrangements, requirements contracts, and exclusive dealing agreements (the distributor agreeing not to carry the products of the seller's competitors).

Though the statutory test of illegality is the same as to all, the Supreme Court has given somewhat different treatment to tying clauses on the one hand, and requirements and exclusive dealing contracts on the other. Tying clauses are illegal whenever the seller has a dominant position in the market for the tying product, or whenever a substantial dollar amount of commerce in the tied product is involved. For all practical purposes, this means that tying clauses are illegal *per se*. Tying clauses would hardly be employed unless the seller had sufficient leverage on one product to make the buyer take both. Usually the tying product is covered by a patent, which itself is a " monopoly " and is at least prima facie proof of dominance. Moreover, most tying clauses are used in

situations where a substantial dollar amount of commerce in the tied product is involved.

The test applied to other exclusive arrangements is not quite so stringent. Requirements or exclusive dealing contracts are illegal whenever they "foreclose competition" in a "substantial share of the line of commerce affected." This test is more liberal than the tying clause test in two respects. First, a substantial dollar amount of commerce may be involved in a particular case but not a substantial share of the line of commerce—or the market—affected. Second, although the Supreme Court opinion which announced the test can be otherwise interpreted, it is probably open to defendants to show that the exclusive arrangements do not in fact "foreclose" competition from the segment of the market involved.[4] Thus, it might be shown as to requirements contracts that their duration is no longer than what is appropriate to the needs of the trade, and that in fact buyers can readily shift to other sellers at the end of the contract period. As for exclusive dealing contracts, it might be shown that the exclusive dealers occupy no peculiarly strategic position *vis-à-vis* the consuming market, and that competing sellers can readily secure or establish other dealerships with equal access to ultimate consumers. Presumably, however, it would be more difficult for a powerful seller—larger than his competitors—to make this defence.

A second specific practice dealt with by the Clayton Act, and also by the Robinson-Patman Act, is price discrimination. Here Congressional action reflects the history of two different periods of significantly different character. The original section 2 of the Clayton Act was primarily intended to prevent the kind of price discrimination which had frequently characterised the growth of large companies in the late 1800s and early 1900s, whereby they cut prices to ruinously low levels in successive local markets in order to drive out small competitors, raising the prices once monopoly had been achieved. The primary purpose, in short, was to prevent impairing competition among sellers. Section 2 made it unlawful to discriminate in price where the effect might be to substantially lessen competition or tend to create a monopoly in any line of commerce; except that the prohibition did not apply to discrimination on account of differences in grade, quality or quantity, or to differences which made only due allowance for differences in cost, or to differences made in good faith to meet competition.

In passing the Robinson-Patman amendments, Congress had a quite different purpose in mind, namely, to limit the effects of price discrimination on competition among distributors of the goods sold by manufacturers who discriminated. The great depression and the growth of the large integrated distributors—such as chain stores—had contributed heavily to the mortality of small retail

[4] *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

outlets and intermediate independent distributors like jobbers and wholesalers. These large distributors had been successful in extracting substantial price concessions from sellers. It was feared, although not necessarily proved, that such price concessions made too heavy a contribution to the growth of the large distributors. Thus the law on price discrimination was tightened up in several respects. Price discrimination was made unlawful not only where it might have a tendency to harm competition generally (which cannot easily be demonstrated in the distribution field even though some small outlets may be eliminated) but also where the effect may be to injure the disfavoured buyer (an effect implicit in the higher price charged). The good faith defence—meeting the low price of a competitor—was restricted; the defendant must show in each instance that he had no reason to believe the competing price he was meeting was itself an unlawfully discriminatory price by the competing seller. All quantity discounts must be justified by cost differences. Finally, brokerage payments, or allowances in lieu of brokerage, to buyers who dealt directly with the seller rather than through brokers, were made absolutely illegal.

It would serve no good purpose here to attempt even to outline the refinements of Robinson-Patman Act law. The literature is vast and exasperatingly complex. Suffice it to say that explicitly, as with the anti-brokerage clause, or practically, as with the difficulty of proving that price differences are justified, the Act reflects a policy which may often depart substantially from the main thrust of the antitrust laws. Protection of a certain class of competitors may yield different results from protection of the competitive process generally, particularly where the protected class is threatened by more efficient techniques. Encouragement of a "one-price" policy, the insulation of sellers from the bargaining pressures of large buyers, may foster rigid high prices, particularly where sellers are few. On the other hand, there is more than a little economic and moral sense in attempting to ensure that small competitors will not be handicapped for reasons unrelated to their efficiency, which is what happens when they pay a higher price not justified by a higher cost.

But whatever reason there might be for concluding that an attack on price discrimination can be a consistent part of the general antitrust laws, no such reason applies to resale price maintenance, which may advisedly be called a notable exception to the policy of protecting competition. Resale price maintenance is now broadly permitted, although it has taken some legislative doing to get there. Practically all states have Fair Trade Acts, which not only authorise resale price maintenance contracts between a manufacturer of a trade-marked product and a distributor, but also provide that once a manufacturer has entered into such a contract with one distributor, all other distributors are bound to resell the product at no less than the minimum price

specified under that contract. State legislation does not apply to sales in inter-state commerce, at least in the face of contrary Congressional statutes, but two federal laws have closed the gap. The Miller-Tydings Act of 1937 exempted from the antitrust laws resale price maintenance contracts entered into under state law. The McGuire Act, passed in 1951, repeats the exemption, and also permits manufacturers to enforce state-granted rights against non-signing distributors who sell below the minimum price.

The sole checks on resale price maintenance contracts are that they cannot be entered into where the products concerned are not "in free and open competition with commodities of the same general class"; they cannot be adopted by combined action among manufacturers, among distributors, or among any group in competition with each other; and it is still illegal for distributors, acting in concert, to coerce a manufacturer into adopting resale price maintenance arrangements.

Size and Market Power

As pointed out earlier, the antitrust laws are directed not only at restraints of trade resulting from specific practices but also at the acquisition or retention, by a single firm or a combination of firms, of an undue degree of power over price and output or over the fate of existing or potential competitors.

Undue market power through combination can be and has been dealt with under three different statutory provisions—section 7 of the Clayton Act, and sections 1 and 2 of the Sherman Act.

Section 7 of the Clayton Act deals specifically with "mergers," and like other sections of that Act was designed to make them illegal on a considerably less showing of harm than the Sherman Act required. Congress thought that the Sherman Act was inadequate, since concentration of power might be achieved by a succession of acquisitions of small competitors, no one of which acquisitions could be said to constitute a restraint of trade or an attempt to monopolise.

However, the original section 7 was fatally defective in at least two respects. First, it applied only to merger through purchase of stock, so that well-advised parties simply purchased assets instead. Second, one of the tests of illegality was whether or not the merger would tend to diminish competition between the two firms merged. The courts flatly refused to take this test seriously, since it would invalidate any merger of competitors; and, perhaps because of the bad draftsmanship, they were generally hostile to this section of the Act.

These defects were repaired by legislative amendment in 1951. Section 7 now provides that no corporation shall acquire, directly or indirectly, the whole or any part of the assets of another corporation

> " . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The section thus applies to any merger—horizontal, vertical, or diffuse—which may have the prohibited effect. Action may be taken to enjoin a merger pending decision as to its legality, or to dissolve an illegal merger after it has taken place.

The revision is too new to have been definitely interpreted, but some approaches may be predicted. While a showing of present restraint, or reduction of competition, will not be necessary to invalidate a merger, a showing of some probability of harm will be required; mere possibility is not enough. From the nature of things, however, large companies already having a substantial share of the market will probably find it difficult to justify the acquisition of any financially sound competitor, or to justify any acquisition of a raw materials supplier or of a substantial user of its product where no increase in efficiency is likely to result.

If new section 7 is interpreted to mean approximately what it says, and is reasonably well enforced, there would seem to be no need to resort to the Sherman Act with regard to undue degrees of market power resulting from mergers occurring after 1951. But in other cases, the Sherman Act will apply.

Section 1 of the Sherman Act does not deal explicitly with the problem of market power. However, in prohibiting combinations in restraint of trade, section 1 can be applied to mergers which, though not producing " monopoly " power, noticeably reduce the amount of competition in the market or put competitors at a serious disadvantage. There have been occasional applications of this sort, and as recently as the *Columbia Steel* case of 1948, the Supreme Court, while upholding the merger there involved (by a five to four division), took an approach indicating that mergers would be tested by something less than " monopoly " power.[5] But as an historical matter, there is considerable reason for concluding that " power " is less vulnerable than " practice," certainly in so far as the Government's burden of proof is concerned. A price-fixing agreement is illegal *per se*; undue restraint resulting from merger must be proved.

The law on market power has been most fully developed in the section 2 " monopoly " cases. Here, again, the *Standard Oil* decision of 1911 is the starting point. The Standard Oil Co. was a holding company controlling through subsidiaries around 90 per cent. of the business of transporting, refining, and selling petroleum products. The company had been built up by internal growth, and by extensive mergers and purchases of competing concerns. The history of its growth was studded with malodorous practices—predatory price cutting, boycotts, freight rebates, and the like. The

[5] *United States* v. *Columbia Steel Co.* (1948) 334 U.S. 495.

Supreme Court held, among other things, that the result was an illegal monopolisation, but the reasoning was perhaps more significant than the decision. Acquisition of a high degree of monopoly power over an industry, accomplished in substantial part by mergers or combinations of pre-existing independent firms, was held to give rise in and of itself to a prima facie presumption of intent and purpose to maintain the dominance so achieved and thus to violate the Act. This presumption was fortified by evidence that the combination was built by, or later employed, tactics that were illegal restraints of trade under section 1 of the Act; but such evidence was not necessary to a finding of illegal monopolisation. Consistently with its analysis of the nature of the violation, namely, illegal monopoly power, the court approved a decree dissolving the holding company into its various subsidiary parts. In the same year, the court also approved a decree dissolving the American Tobacco Co., which had achieved a high degree of dominance in the tobacco products industry in ways far less colourful than those employed by Standard Oil.[6]

But the far-reaching import of these decisions did not carry through. In two decisions in 1918 and 1920 the Supreme Court refused to apply section 2 to large combinations in the steel and shoe machinery industries.[7] The doctrinal retreat was not obvious; the court held that neither combination possessed monopoly power, and technically the decisions were explainable on that ground. But there was clearly a retreat in result, since the facts, reasonably interpreted, showed that the combinations were dominant in their respective markets and had high degrees of control over price and the position of competitors.

In any event, enforcement of section 2 against concentrations of market power was dampened almost to extinction for two decades to come. The limitation was not removed until a series of post-World War II decisions not only restored, but in some respects extended, the section 2 doctrines of *Standard Oil*. The current doctrines are strong. Size alone, though not illegal, is "an earmark of monopoly power." A single firm, a combination of formerly independent firms, or a group of firms in conspiracy, may be held to have "monopoly power" even though there are competitors in the field.

> "The material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually excluded, but that power exists to raise prices or to exclude competition when it is desired to do so."[8]

Where the offence is monopolisation—as distinct from an unsuccessful attempt to monopolise—no specific intent to monopolise need

[6] *United States* v. *American Tobacco Co.* (1911) 221 U.S. 106.
[7] *United States* v. *United Shoe Machinery Co. of New Jersey* (1918) 247 U.S. 32; *United States* v. *U. S. Steel Corp.* (1920) 251 U.S. 417.
[8] *American Tobacco Co.* v. *United States* (1946) 328 U.S. 781.

be shown. It need only be shown that the steps leading to monopoly power were deliberately taken. Proof of combination is conclusive as to intent—those who combine are presumed to intend what resulted. Even where the monopolist is a single firm that has achieved its position largely through internal growth, illegal monopolisation is proved by showing business methods—other than those attributable to such factors as " skill, industry and foresight "—which have the effect of excluding existing or potential competitors.

However, a reluctance to apply the remedy of dissolution to concentrated power is not yet dead. Dissolution has been decreed in numerous post-war cases, yet, as recently as the *Timken* case of 1951, two members of the Supreme Court, in the controlling opinion on this issue, rejected divestiture as a " harsh " remedy, not to be employed where less drastic decrees might suffice to restore competition.[9]

II—The Effects of the Antitrust Laws

To some extent, at least, the doctrines of the antitrust laws accurately describe their actual effects.

Overt price-fixing, market sharing, or group boycotts rarely appear on the American scene in markets of any national significance; where they appear, they are usually short-lived. They have been more common in local markets, particularly in the construction industry, but even here federal enforcement agencies have been active, and would-be conspirators tend to operate in the twilight. The result is that markets which would normally be satisfactorily competitive in the absence of overt agreement have by and large been kept so.

I suppose that few would now dissent from the assertion that this contribution of the antitrust laws has been significant and highly beneficial to the American economy. At the risk of misreading the British mind, I would point to the adoption of the Monopolies and Restrictive Practices Act as an expression of this belief. The comparative absence of restrictionism in American markets has quite clearly meant greater pressure toward lower prices, lower costs, and the introduction of new products and new techniques.

As a weapon against concentration of power, the antitrust laws have been less of a success. The promise of the *Standard Oil* case faded nearly away for quite a long time. Nevertheless, while the matter is necessarily speculative, there are fair grounds for concluding that antitrust laws have had their deterrent effect even on concentration, that many large firms have desisted at times from a further absorption of competitors that would make their monopoly power more evident. More certainly, the antitrust laws

[9] *Timken Roller Bearing Co.* v. *United States* (1951) 341 U.S. 593.

have had an effect on the behaviour of firms in concentrated industries. The predatory tactics of the old buccaneering days have virtually disappeared. The difference between overt agreement and " conscious parallelism " in concentrated industries may not be great, but it is not insignificant.

In any event there is no indication that concentration, in the sense of market power, has increased. Recognising again the limitations of data, the probability is that it has decreased. Many actual or potential monopolies have been thwarted by a constant proliferation of new products and new techniques—a growth in substitutability. Once unique products quickly become only " slightly unique." Once isolated local markets, dominated by one or a few firms, have been breached by vast improvements in transportation. Apart from public utilities, we have few markets dominated by single large firms, and perhaps none if " markets " are defined to include close substitutes. The antitrust laws have not been wholly responsible for these developments, but it would probably be generally agreed that they have substantially helped.

Much of the criticism of the results of the antitrust laws stems from a narrow and unrealistic conception of what an effectively competitive market is. The economist's static definition of a perfectly competitive market—a very large number of sellers and buyers, a homogeneous product, perfect knowledge of alternatives, etc.—is a useful analytical tool but an inadequate descriptive one, and few modern economists would attempt so to use it. It is now generally recognised that a " workably competitive " market—a market which can be expected to produce competitive results—may well exist with one or more of the theoretical criteria being absent; and it is quite possible the addition of a second imperfection in a market already imperfect in some respect may make the market more rather than less competitive.[10] It may be tolerable in some situations to have comparatively few sellers, so that one's decision has an impact on the others, provided that the impact is not too immediate and too great, or provided that it is uncertain. Lack of product homogeneity, while giving each seller a modicum of " uniqueness " and a modicum of power, may contribute just this uncertainty, and cause sellers to indulge in price competition, or competition by product improvement, with considerable vigour. While the matter is difficult to prove one way or the other, it is at least possible that many American industries, though seemingly concentrated in form, are workably competitive in substance.

[10] The original use of the term " workable competition," and an important part of its subsequent development, is attributable to J. M. Clark. See Clark, " Toward a Concept of Workable Competition," (1940) 30 *American Economic Review* 241. Additional discussion may be found in Edwards, *Maintaining Competition*; Galbraith, *American Capitalism*; Adelman, " Effective Competition and the Antitrust Laws," (1948) 61 *Harvard Law Review* 1289; and Mason, " The Current Status of the Monopoly Problem in the United States," (1949) 62 *Harvard Law Review* 1272.

Of course, this is not to say that there is no undue concentration in American industry. There is. Nor is it to say that the competitiveness of many industries could not be substantially improved by more rigorous application of the antitrust laws. In many cases it could be. But it is to say that the competitive potential of American industry has been in large part realised, and for this the antitrust laws deserve a good share of the credit. Finally, while it might go too far to say that businessmen are delighted with the antitrust laws, there seems little doubt that as a group they have come more and more to realise the benefits which the policy of protecting competition has conferred, and to accept as necessary at least some of the limitations on their own behaviour which the laws impose.

III—Unresolved Problems

As suggested at the beginning of this article, and as indicated in the subsequent discussion, American antitrust policy is unsettled in some important respects.

These unsettled problems—which are both legal and political—almost all revolve around the question of "size," but in fundamentally different contexts and with fundamentally different issues at stake.

The first problem is the extent to which small enterprises, particularly in the distribution field, are to be protected. The proponents of resale price maintenance and full-blown laws against "price discrimination" frequently put their case on anti-monopoly and pro-competition grounds. These arguments seem largely specious. If the sole purpose to be served was to protect small distributors from disadvantages unrelated to economic efficiency, the purpose could be achieved either under the general body of antitrust law or by selective legislation far short of resale price maintenance, and without certain existing provisions of the Robinson-Patman Act. Resale price maintenance clearly tends to keep high-markup small outlets in business despite inefficiency; to say nothing of the fact it probably tends to promote higher manufacturers' prices by sterilising the bargaining pressure of distributors and by facilitating parallel price policies among competing manufacturers. The anti-brokerage clause of the Patman Act quite plainly constitutes price discrimination against large direct buyers —the seller gets the same price from them without having to pay the costs of brokerage.

Moreover, the economic nature of the distribution field and available historical evidence indicate that the possibility of monopoly through gradual extinction of small competitors is remote. There is little or no resale price maintenance in the grocery business, yet small grocers persist—partly because of co-operative buying techniques, partly because they offer services and conveniences not offered by supermarkets and chains.

The more arguable case for laws protecting small enterprises from competition is not economic but social. It is the argument that society is healthier when it has considerable room for small individually owned enterprises than it is when all or most all business is in large corporate form, and that any efficiency which may result is a small price to pay for this benefit.[11] It is neither possible nor appropriate for me to pass judgment on that question here. But it appears, in light of the heavy Congressional majorities in favour of the McGuire Act, that an affirmative decision has been made and that protection of small distributors by resale price maintenance is in for a good long stay.

The second unresolved problem is what to do with " size " in manufacturing industries. This is occasionally put as whether or not we should attack size " as such." To be sure, as an historical matter, there is considerable reason for believing that the Congresses which passed early antitrust legislation were not thinking primarily in economic terms—in any refined sense—but were at least equally concerned with size for other reasons, much as in the more recent legislation protecting small distributors. Moreover, there are still some who would wish to attack size as such, and to split up large corporations without regard to efficiency or to effective market power. But they are comparatively few, and at this late date are probably voices crying in the wilderness. And certainly the antitrust laws have not been interpreted to apply to size as such, without regard to the market in which it appears. For one reason or another, interpretations of antitrust law have been principally based on economic rather than social considerations.

The real dispute is over " relative size," or size in an " oligopoly " market where a few firms *in fact* have effective market control. It is being seriously urged, although without much support in judicial decisions to date, that the antitrust laws should not be applied to concentrated industries which have demonstrated reasonably satisfactory performance, *i.e.*, reasonable prices and reasonable progressiveness in productive techniques and product improvements.[12] This test would represent a fundamental departure from the basic premise of the antitrust laws, that the reasonable restraint of today may become the unreasonable restraint of tomorrow, and that competition is to be protected because competitive markets in the long run perform *better*. Of course, performance considerations undoubtedly and properly enter into the decisions of enforcement agencies, who, with limited resources, must necessarily select cases where success will do the most good. They may also influence judges in particular cases, in formulating a decree if not in determining whether there has been a violation.

[11] Mr. Justice Brandeis, in *The Curse of Bigness* and other writings, was one of the most articulate exponents of this view.
[12] See, *e.g.*, Lilienthal, *Big Business: A New Era*.

But it seems unlikely that the law as such will be revised to permit a performance test instead of a " market power " test, not merely because of the fundamental change that would be wrought, which I think is unpalatable to most, but also because of the enormous difficulties that would be presented in deciding cases. It may be difficult to determine whether or not a group of firms has an " undue " control over a market—complex and often imprecise economic analysis is required. But this is nothing compared to the difficulties of determining whether an industry's performance is " good " or " bad," since no acceptable frame of reference is available. Each industry is in a real sense unique—the nature of the product is different, the technology is different, the potentialities of research and development are different, the nature of the demand differs, and so on. Good performance in a declining industry may be bad performance in an expanding one. Norms capable of general application are difficult to define.

However, even assuming the law remains as it now is, there are difficulties in dealing with the " oligopoly " problem, the more or less inevitable lessening of competitive behaviour in markets dominated by a few sellers. Initially, the problem is one of proving the statutory element of " combination " or " conspiracy " in restraint of trade, or that firms have " combined or conspired " to monopolise. Where an industry consists of many sellers, this is a comparatively easy task. Usually there is ample evidence of intercommunication and planned common courses of action. And, in any event, economic evidence of parallel policies over a variety of market conditions yields a strong, and in some situations even a conclusive, inference that such uniformity could not have been arrived at except through explicit agreement. But neither of these proofs is so likely where sellers are few. Here, each seller can more readily predict the reaction of his competitors to, say, a price move on his part, a reaction which is likely to be swift. In the " pure " case of oligopoly, market behaviour will tend to resemble that of a single monopolist, because of the " consciously parallel " action of each seller who recognises the close interdependence of his own interests with those of his competitors.

Thus, where sellers are few, it is less likely that evidence of overt agreement will be found, simply because sellers are less likely to find such agreement necessary. At the same time, it is less reasonable to draw the inference of " conspiracy "—in the usual sense of that word—from economic evidence of parallel policies, since the contrary inference of purely individual action in the light of known market facts is at least equally probable.

While the Supreme Court has recently held—perhaps a reiteration—that economic evidence of conscious parallelism was not conclusive of conspiracy,[13] the more important question as to

[13] *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.* (1954) 346 U.S. 537.

whether an inference of conspiracy *may* be drawn in all cases has not been resolved. The definition of conspiracy in this area has become quite broad, and in at least two comparatively recent cases the evidence of overt agreement was not only slender but seemingly unconnected with the principal restraints charged. However, it is still quite doubtful whether conspiracy would be found on the basis of parallel action alone in the "pure" oligopoly case.

The second hurdle in these cases is the question of an adequate remedy. An injunction against parallel action by a few dominant sellers is of dubious merit, and in fact makes little sense. Since parallelism results from recognition of the obvious fact of interdependence, and knowledge that a certain decision will produce a fairly certain reaction by competitors, an injunction against parallel action is in effect a direction to run the business irrationally. The problem, of course, is the structure of the market, and the appropriate remedy, if any, begins with breaking up the few firms into more numerous parts. The willingness of courts to grant divestiture thus becomes a critical issue in this area.

In some cases, though perhaps few, an increase in the number of sellers sufficient to make the market workably competitive could not be achieved without reducing size below the most efficient level, a result which might be worse and, in any event, would be unstable. In other cases, where market power rests on strong trade-marks and heavy advertising (as in cigarettes), further remedies—not yet attempted and of doubtful availability—might be necessary.

The above discussion, of course, does not exhaust the current antitrust problems, or the changes that may be made. There are several open questions in the area of administration and enforcement. The length of court trials in "big" cases, which often stretch over several years, is a burden to all concerned. The division of enforcement functions between two federal agencies, the Department of Justice and the Federal Trade Commission, is cloudy and in at least some respects probably illogical. There is also considerable doubt whether criminal sanctions are appropriate for those kinds of violations—such as undue market power and the less invidious kinds of restraints—where the law is necessarily somewhat vague and imprecise. As to these questions, we might well learn some lessons from the British statute.

But changes are not likely to produce any substantial alteration in the basic American approach. I might note, in concluding, that both in World War II and during the Korean War, when pressures for abandonment of competition were keen, the Congress took special legislative steps to ensure that any departures from the policy of competition should be carefully supervised and kept to the minimum consistent with wartime needs.

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IDENTITY IN CONTRACT AND MR. WILSON'S FALLACY

Mr. Wilson's recent article on mistake [1] may be summed up as concerned to vindicate the authority of Pothier and that of the decision in *Sowler* v. *Potter*.[2] He has succeeded in his first purpose by showing that Pothier's ambiguous words do not contain a definition of mistake as to identity, but only state a condition which must be satisfied before such a mistake can operate.[3] This reading of Pothier should satisfy even the severest critics of that author. But Mr. Wilson is not content to show that the blame for the decision in *Sowler* v. *Potter* cannot be laid on the shoulders of Pothier; his principal aim, it would seem, is to show that this decision is sound in law. To achieve this purpose he advances a new theory of the nature of mistake as to identity. *Sowler* v. *Potter* has been discussed so often that it would be hard to justify another expression of opinion on this subject, but Mr. Wilson's new theory of mistake should not be allowed to pass without challenge. It is plausible enough to cause confusion and it has implications which go beyond the subject of mistake of identity.

According to Mr. Wilson, a mistake as to identity which will prevent a contract exists whenever it can be shown that there was no intention to deal with the person with whom apparently a contract has been concluded. It is not essential to prove that there was an intention to deal with a third identifiable person. The introduction of a third identifiable person may be useful to prove mistake, but mistake can be proved without it.

This conception of mistake is negative, it insists upon no more than the absence of a specific contractual intent and this, it is submitted, is untenable as a matter of psychological fact, quite apart from its legal aspect. The mind of the person labouring under a mistake is not just a blank, it contains a false picture of reality. Every mistake involves a mental confusion of truth and falsehood, it involves ignorance of the truth as well as a positive belief in a falsehood. In the case of mistake as to identity there is not only ignorance of the true identity but also a positive belief that the person in question has been identified. There is a failure to recognise together with a false belief that a separate

[1] "Identity in Contract and the Pothier Fallacy," 17 M.L.R. 515.
[2] [1940] 1 K.B. 271, and, more fully reported, in [1939] 4 All E.R. 478.
[3] So also Professor Glanville Williams in 23 Can.B.R., at p. 393: "The fact that Pothier does not correctly state the English rule as to what is an error of identity (which I freely admit) does not imply that he does not correctly state the English rule as to the condition that must be satisfied before an error of identity avoids the contract."

identity has been established and verified. Miss Sowler (or her agent) not only failed to recognise Ann Robinson behind the alias which had been assumed, she also believed in the existence of Ann Potter as a person separate from Ann Robinson. In objective truth Ann Potter did not exist, but in the subjective belief of Miss Sowler she did exist as a third identifiable person. Mr. Wilson's premises, therefore, do not enable him to dispense with recourse to the third identifiable person, they merely compel him to allow this part to be played by a fictitious or non-existing person.[4] Whether or not this is right cannot be determined in logic. If A contracts with B in the belief (known to B) that B is not B, it may be possible to say that A is mistaken as to B's identity even although A does not believe that he is dealing with a third person C who does exist in fact. But whether in law this contract is to be held void for mistake can only be decided as a matter of convenience in the light of the available authorities.[5] Dr. Goodhart's discussion of this question,[6] which, it is respectfully submitted, is convincing in law, does not dispose of the problem in logic. Dr. Goodhart maintains that the contract is not void unless it contains a term that B is not B. A, whatever his belief, did in fact contract with the person who was B. But although this person was B in fact, in the subjective belief of A the person with whom he dealt was not B. Dr. Goodhart, dealing with the situation as it exists in objective fact, concludes that there was no third party and no mistake as to identity. This conclusion is sound as a matter of convenience and is in accordance with the best authorities, but it cannot be denied that it is derived from what is in a sense an arbitrary preference of objective fact to subjective belief.

Two principal arguments are used by Mr. Wilson to show that more convenient results can be obtained by means of admitting mistake without insisting upon proof of a third identifiable person, which, as shown, must be taken to mean proof of the objective existence of a third person. In the first place, he maintains that to insist upon the presence in objective fact of a third person imposes artificial limits to the doctrine of mistake. Secondly, he claims that his thesis avoids some curious anomalies. The first point can be answered briefly by pointing to the paramount public policy

[4] To maintain consistency with the language of the Bills of Exchange Act, 1882, s. 7 (3), as interpreted in *Bank of England* v. *Vagliano* [1891] A.C. 107, it would seem better to describe Ann Potter as non-existing. See also, *infra*, n. 13.

[5] Professor Glanville Williams, *loc. cit.*, *supra*, n. 3, has shown that in the opinion of modern philosophers the distinction between substance and quality and the corresponding distinction between identity and attributes are purely verbal. They are maintained as technical distinctions in English law on the basis of a rule which was violated in *Sowler* v. *Potter*. This rule (*i.e.*, Mr. Wilson's third identifiable person test) possesses "no inherent virtue . . . but it is necessary to have some rule and this seems to be the one that most nearly fits the cases and on the whole gives the best results."

[6] 57 L.Q.R. 228.

of sanctity of contract.[7] If a contract is declared void for mistake, innocent third parties may suffer whose hardship is almost invariably greater than that of the mistaken party should the contract be upheld. It is therefore no commendation of any argument that it helps to extend the operation of mistake.

Mr. Wilson's second point calls for some examination of what he means by curious anomalies. It may mean that there is injustice and it may mean that there is inconsistency and arbitrary discrimination between essentially similar situations. It is anomalous, Mr. Wilson maintains, that a contract cannot be held void although consent to it has only been obtained by the use of a false name. It would indeed be unjust to deny relief to the person who has been misled. But, of course, there is no question but that a very effective remedy is available to him in damages or rescission for fraudulent misrepresentation (to say nothing of the possibility of a criminal prosecution). Even if the lease granted by Miss Sowler was not void it was certainly voidable. As between the parties to the contract, justice can be administered more fully and satisfactorily by the flexible remedies for fraud than by the rigid and drastic consequences of mistake. As in all but one of the eleven cases[8] discussed by Mr. Wilson the mistake had been induced by fraud, it is surprising to find no mention of the consequences of fraud in his article.[9] If Mr. Wilson's thesis were accepted, it would not improve the position of these eleven or any other victims of mistake *vis-à-vis* the other party to the contract. It might help in a hypothetical case to recover from a third party property which had passed under the contract. But this would not advance the ends of justice.

Mr. Wilson's charge of inconsistency is made by the use of Dr. Goodhart's illustrations of the difference between not knowing who the person is with whom one intends to contract, and making a mistake as to the identity of that person.[10] If B knows that A does not wish to deal with him and, therefore, disguises himself, any contract made will be void if B's disguise made him look like C, but a contract will not be void if the disguise merely concealed B's identity. Mr. Wilson seeks to achieve consistency by treating the contract as void in both cases. But if it is remembered that in both cases the remedies for fraud are available to A, the charge of inconsistency can be maintained only with regard to the position of a third party deriving title under the contract, or if the facts are varied, so as to remove the element of fraud. It must then be assumed that B has innocently changed his name or appearance

[7] See Mr. Tylor in 11 M.L.R. 257, at p. 259. "The paramount importance of preserving the stability of contractual relations embodied in the maxim *pacta sunt servanda*, renders essential this limited recognition of the sphere of operative mistake in the formation of contract."

[8] *Boulton* v. *Jones* (1857) 27 L.J.Ex. 117.

[9] Except when giving an account of *Gordon* v. *Street* [1899] 2 Q.B. 641.

[10] 57 L.Q.R., at p. 242.

either so as to resemble C, or so that he is not recognised by A who then offers to contract with him. It must also be assumed that B realises that A has made this mistake and that but for it the offer would not have been made.

Clearly, these situations cannot arise very easily and it is significant that there seems no reported case in which these facts occurred.[11] If the law is inconsistent, it is so in a matter which is quantitatively of little importance. Moreover, Mr. Wilson would only cure this inconsistency at the cost of creating another between contracts made with a person whose identity is concealed and contracts with a person whose true character is unknown. It is not easy to see why a contract should be void because it has been made with a person who has disguised himself or has adopted another name, whereas it would not be void although made with a person whose true character has been misconceived in the most vital and fundamental aspects. In such a case it could easily be said that there was no intention to contract with the person as he really is but only with someone of a totally different character. The point can be illustrated by considering three variations of the facts of *Sowler* v. *Potter* without the element of fraud. Ann Robinson might receive an offer of a lease from Sowler. (1) The offer is addressed to Ann Potter which is the name she has assumed (without fraudulent intent). She realises that the offer is intended for another person of the same name. (2) There is no other person for whom the offer is intended. She realises that she has simply not been recognised because of her change of name. (3) There has been no change of name and the offer is addressed to Ann Robinson. She realises that Sowler does not appreciate that she is the Ann Robinson with a criminal record.

It is clear that in the first case no contract could result from Ann Robinson's acceptance of the offer and that in the third case the contract would be valid, the mistake of Sowler being one of character or attribute.[12] The second case is at least as near to the

[11] There are a few reported cases of contracts, mostly negotiated *inter absentes*, where mistakes about identity were not induced by fraud. But in these cases, although A made the mistake, B did not know that it had been made, or that A was unwilling to deal with him. Thus, in *Boulton* v. *Jones*, *supra*, n. 8, B did not know of the existence of the set-off which accounted for A's unwillingness to deal with him. In *Mackie* v. *European Assurance Society* (1869) 21 L.T. 102, A realised his mistake before accepting B's offer. The decision in *Re Reed* (1876) 3 Ch.D. 123, can only be supported on the assumption of fraud: see Benjamin on *Sale*, 8th ed., at p. 103, n. (*x*). In *Stoddard* v. *Ham* (1880) 129 Mass. 383, B did not know that A had made a mistake.

[12] Unless, indeed, Mr. Wilson should be prepared to argue that even in this case the contract would be void because of mistake as to identity. It would then become necessary to imagine a fourth case where Sowler, never having heard of Robinson or of her conviction, addresses an offer to her in ignorance of her criminal record. This would undoubtedly be no more than a case of mistake as to character, and it would then become necessary to justify discrimination between the third and this fourth case, a task no less difficult than that of explaining why the second case should be treated differently from the third

third as it is to the first and, however it is dealt with, an inconsistency will ensue. Mr. Wilson would insist that it must be treated as a case of mistaken identity so as to throw upon an innocent third party, relying on the validity of the contract, not only the small risk of an offer intended for Potter reaching the hands of Robinson, but the appreciably greater risk of Sowler failing to recognise Robinson behind a new name adopted by her. The critics of *Sowler* v. *Potter*, on the other hand, would insist that, even if the contract in the first case must be treated as void for mistake, there is no good reason for discriminating between the second case and the third. It may be possible in logic to describe the second case, with Mr. Wilson, as one of mistaken identity but it is by no means illogical to treat it as one of mistake as to name rather than identity, and this course seems preferable when considered in the light of practical justice. If it is hard on Sowler to insist on the validity of the contract and—in the absence of fraud—to deny her relief, it would be harder still on a third party to treat the contract as void [13]; even as between the parties *caveat emptor* and sanctity of contract are arguments as forceful in the second as in the third case. It may be a matter of regret that in the first case these arguments and the hardship suffered by a third party are not allowed to prevail.[14] In any case, this situation is one that cannot arise easily.[15]

These considerations apply with even greater force to contracts made *inter praesentes*. It is almost impossible to conceive a situation where a contract is made *inter praesentes* as a result of a self-induced mistake whereby B is believed to be C. On the other hand the third situation, that of mistake as to character, is as

[13] It is for the sake of third parties that a bill payable to a non-existing person is treated as a bearer bill rather than as void. This implies, in a sense, a willingness to deal with the situation as it exists in the subjective belief of the drawer rather than on the basis of objective fact. But the same considerations of policy which dictate this preference of subjective belief to objective fact require that in the case of a contract made by mistake with a non-existing person the contract should be treated as valid, or voidable for fraud, but not as void for mistake as to identity.

[14] "There is much to be said for the view that all cases of mistake should be subjected to the discretionary action of the judge, at any rate all the cases in which the two parties to the action are innocent." Professor F. H. Lawson in *Roman Law and Common Law*, by Buckland and McNair, 2nd ed., at p. 213.

"Under German law, mistake does not render a legal transaction void as it does under English law. It may, however, render it voidable." Dr. E. J. Cohn in *Manual of German Law*, Vol. I. p. 47.

Also in French law, mistake as to identity renders a contract only voidable. See Colin and Capitant. *Cours Elementaire de Droit Civil Français*, Vol. II, 10th ed., p. 41; Amos & Walton, *Introduction to French Law*, p. 154. Williston, *Contract*, § 1600 F.

[15] "In the circumstances it is not altogether surprising to find that the decision in *Cundy* v. *Lindsay*, which protected the mistaken party against the innocent third party, does not seem ever to have been followed, at any rate in England, in a case where a third party was affected." Professor F. H. Lawson, *op. cit.*, *supra*, n. 14, at p. 208.

easily imagined *inter praesentes* as *inter absentes*.[16] The second situation, that of B not being recognised because of changes in his appearance, is by no means impossible even if it is not as frequent as that of mistake as to character. It seems sound and reasonable, if there must be discrimination between these three situations, that the line should be drawn so as to separate the near-impossible from the other two, both within the realm of practical experience.

Mr. Wilson's reconciliation of his theory of mistake with the authorities can be dismissed for the most part by pointing out that it is achieved simply by the arbitrary use of italics so as to present judicial dicta torn from their factual and logical context. He deals with *King's Norton Metal Co.* v. *Edridge*,[17] the case generally believed to be most clearly opposed to *Sowler* v. *Potter*, by laying stress on the fact that there had been previous dealings between the King's Norton Metal Co. and Hallam & Co. But this fact of itself is insignificant. It would have made no difference to the decision in *Cundy* v. *Lindsay* (*infra*, n. 25) if there had been previous dealings between Lindsay and Blenkarn pretending to be Blenkiron. Because of the previous dealings with Hallam & Co. the King's Norton Metal Co. had come to believe firmly in the existence of this firm. These dealings do not explain that they had no intention not to deal with Wallis. This was due simply to the fact that they had never heard of him. This fact, therefore, might be used to distinguish this case from *Sowler* v. *Potter*,[18] since Sowler (or her agent) knew of the existence of Ann Robinson and was found to have made up her mind not to deal with her. The case of *Gordon* v. *Street* [19] resembles *Sowler* v. *Potter* in this respect, and as *Gordon* v. *Street* is linked to *King's Norton Metal Co.* v. *Edridge* by the fact that Smith L.J. was a member of the court on both occasions, Mr. Wilson can rightly stress that the point of distinction cannot have escaped a judge who in *King's Norton Metal Co.* v. *Edridge* had decided that the contract was not void for mistake, whereas in *Gordon* v. *Street* he expressed the view that the contract was void. From the point of view of Mr. Wilson it is, of course, regrettable that in *Gordon* v. *Street* these observations were only *obiter* [20]; on the other hand, as far as the

[16] Buckland and McNair, *op. cit.*, *supra*, n. 14, at p. 199: "There can hardly be a contract in which both parties are fully and correctly informed on all the facts which might influence the mind in determining whether to contract or not."

[17] (1897) 14 T.L.R. 98.

[18] This point was made in defence of *Sowler* v. *Potter* by Sir Lancelot H. E. Elphinstone in *The Conveyancers' Year Book*, 1942, p. 32. But his contention, that it was a term of the contract between Sowler and Potter that the latter was not Ann Robinson, is untenable. See Dr. Goodhart, *loc. cit.*, *supra*, n. 6, who has also pointed out, *ibid.*, at p. 242, that if "there were such a term in the contract then the contract would be void, not on the ground of A's mistake, but because B could not perform his promise that he was not B."

[19] [1899] 2 Q.B. 641.

[20] See Pollock on *Contracts*, 13th ed., p. 388, n. 10a.

significance of these dicta is concerned, his view seems preferable to that of Dr. Goodhart, who disposes of these "unfortunate" observations by suggesting that Smith L.J. would have changed his mind had the point been argued before him.[21]

However, even if one concedes that there is an important difference in the facts of *Gordon* v. *Street* and *Sowler* v. *Potter* on the one hand, and those of *King's Norton Metal Co.* v. *Edridge* on the other, does it follow that the former situation, but not the latter, is one of mistake as to identity? If such a mistake was made in the former two cases, then this was due to the fact that in the belief of the mistaken party there existed a person, Ann Potter (Addison), distinct and separate from another person, Ann Robinson (Gordon), as well, of course, as distinct from all other persons known or unknown to Sowler (Street). In *King's Norton Metal Co.* v. *Edridge*, the mistaken party also believed in the existence of a person or firm, Hallam & Co., as distinct from all other persons known or unknown to them. Although the King's Norton Metal Co. had never heard of the rogue Wallis, it is clear that, had they been told that there was such a person, they would have kept him in mind as an entity separate from that of their customers Hallam & Co. It may not be to the point that they might or might not have been willing to deal with Hallam & Co. if they had known that this was an alias for Wallis, or that they certainly would not have dealt with Hallam & Co. if they had known that this was an alias adopted by a rogue. But it is decisive that, to them, Hallam & Co. was no less distinct from Wallis than Potter from Robinson (or Addison from Gordon). A separate identity can be established in subjective belief whether or not other persons are known or unknown to him who holds this belief. Mr. Wilson's theory of mistake as to identity presupposes three persons by including in the count the person who only exists in the mind of the mistaken party. This method of counting produces the total of three also in *King's Norton Metal Co.* v. *Edridge*. If on the other hand, only those are counted who exist in objective fact, *King's Norton Metal Co.* v. *Edridge* cannot be distinguished from *Sowler* v. *Potter* (or *Gordon* v. *Street*). If the issue raised by Mr. Wilson is that of either looking at the facts through the eyes of the mistaken party, or of adopting an objective approach, then Smith L.J. can be cited as having preferred the objective approach when, in *King's Norton Metal Co.* v. *Edridge*, he said that Hallam & Co. and Wallis were only one entity, and Mr. Wilson himself adopts this objective approach when he says of Hallam & Co. and Wallis that "the two were identical."

Mr. Wilson also claims to derive support from *Phillips* v. *Brooks* [22] and *Dennant* v. *Skinner* [23] or, at any rate, to be able to

[21] 57 L.Q.R., at p. 237.
[22] [1919] 2 K.B. 243.
[23] [1948] 2 K.B. 164.

reconcile these cases with all the others on this subject. If it is true to say that academic lawyers attempt to reconcile the irreconcilable,[24] then this is no credit to them and no argument in favour of their theories. If *Phillips* v. *Brooks* or *Dennant* v. *Skinner* cannot be reconciled with *Cundy* v. *Lindsay* [25] and *Hardman* v. *Booth* [26]—just as *Sowler* v. *Potter* cannot be reconciled with *King's Norton Metal Co.* v. *Edridge*—then it is no argument in support of Mr. Wilson's thesis that he has found a formula that will achieve the logically impossible. But is it true that *Phillips* v. *Brooks* (or *Dennant* v. *Skinner*) are inconsistent with the view that mistake as to identity presupposes the existence (in objective fact) of three persons?

Here, it seems, Mr. Wilson is arguing from the wrong premiss. To insist upon the existence of a third identifiable party as a prerequisite of a mistake of identity does not compel the conclusion that the presence of such a third party must necessarily produce a mistake as to identity. It would have been possible (and it might have been simpler), but it was not inevitable to hold that such a mistake had been made in *Phillips* v. *Brooks*. The point of this case is that although using the name of a third person may easily lead to a mistake of identity *inter absentes*, it does not necessarily have the same effect *inter praesentes*. *Inter praesentes* such a mistake is produced by a disguise, but identity remains undisguised if merely a false name is assumed. Phillips would have had no difficulty in recognising North at an identification parade, and the same is true of the auctioneer in relation to King in *Dennant* v. *Skinner*. In order to reconcile these cases with *Cundy* v. *Lindsay* or with *Hardman* v. *Booth* it is therefore not necessary to abandon the third party as a requirement of mistake as to identity, or to fall back upon the "ingenious and unrealistic explanation" [27] of *Phillips* v. *Brooks* offered by Lord Haldane in *Lake* v. *Simmons*.[28]

It remains to draw attention to the wider implications of the issues raised by Mr. Wilson which provide the principal justification for the present addition to the already formidable amount of literature on this subject. The first of these wider implications is pointed out by Mr. Wilson who argues that the third identifiable person test amounts to no more than a restatement of the elementary rule that "no one can accept an offer except the person to whom it is addressed, thus making nonsense of the detailed treatment given to mistake in textbooks" [29] It is certainly correct that the rules concerning mistake follow from those concerning the formation of consent. As for the treatment of mistake in the textbooks, it would be going too far to describe it as nonsensical, but some books are open to criticism because they have paid

[24] See the remark of Lord Goddard C.J. in *Hibbert* v. *McKiernan* [1948] 2 K.B. 142, at p. 149.
[25] (1878) 3 App.Cas. 459.
[26] (1863) 1 H. & C. 803.
[27] Dr. Goodhart in 57 L.Q.R., at p. 240.
[28] [1927] A.C., at p. 501
[29] 17 M.L.R., at p. 528.

insufficient attention to this point. On the other hand, there is no reason for refraining from detailed and separate discussion of mistake as long as the interrelation between this and other rules is explained. Some authors have done this by introducing mistake into their account of the rules concerning offer and acceptance.[30] Others have made the point with even greater emphasis, as, for instance, Mr. Slade, who has entitled his recent article on this subject "The Myth of Mistake in the English Law of Contract," [31] as if in anticipation of Mr. Wilson's argument.

The second of the wider implications of Mr. Wilson's thesis concerns its bearing on mistakes about the subject-matter of a contract. The legal effect of such mistakes depends on the distinction between identity and character, attributes, or qualities, as much as the effect of mistakes about the other party to the contract. It follows that a mistake about the identity of the subject-matter presupposes a second and distinct identifiable object, existing in objective fact, just as a mistake about the identity of the other party depends upon the presence of a third identifiable person. There was such a separate second object in *Raffles* v. *Wichelhaus*,[32] which is a case parallel to *Cundy* v. *Lindsay*; but there was no second object in *Leaf* v. *International Galleries*[33] as there was no third person in *King's Norton Metal Co.* v. *Edridge*. If *Sowler* v. *Potter* cannot be reconciled with this last case, *Nicholson & Venn* v. *Smith Marriott*[34] cannot stand with *Leaf's* case, as far as these decisions are concerned with mistake.[35] The observations of Hallett J. in *Nicholson & Venn* v. *Smith Marriott* rest upon the notion of mistake about substance as tantamount to mistake as to identity and therefore different from mistake about qualities.[36] But, as Professor Glanville Williams has shown, "there is no metaphysical 'substance' independent of qualities." [37] To mistake a Georgian for a Carolean antique, however substantial the difference between them, is to make a mistake about one of the qualities, namely the age, of the article. The rule which leads to this result is the same, and based upon the same considerations of policy, as the test of the third identifiable person. Mr. Wilson's attack on this test and his defence of *Sowler* v. *Potter* is therefore apt to confuse the issue raised by *Nicholson & Venn* v. *Smith Marriott*. The connection between the so-called Pothier fallacy and *Sowler* v. *Potter* has now been made clear; it is perhaps no less important to appreciate the relation between Mr. Wilson's fallacy and the category of mistake as to substance for which, it is submitted, there is no room in the law of contract.

J. UNGER.*

[30] Williston, *Contracts*, §§ 94–95a; Chitty on *Contracts*, 21st ed., p. 18.
[31] 70 L.Q.R. 385.
[32] (1864) 2 H. & C. 906.
[33] [1950] 2 K.B. 86.
[34] (1947) 177 L.T. 189.
[35] See Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. 671, at p. 692.
[36] So also Mr. Tylor in 11 M.L.R. 262.
[37] 23 Can.B.R., at p. 271.

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CORRESPONDENCE

The Editor,
The Modern Law Review.

Dear Sir:

May I be permitted a brief comment on Mr. J. F. Wilson's scholarly article in the November, 1954, issue of this *Review* entitled "Identity in Contract and the Pothier Fallacy." Despite the author's persuasiveness, even if one were to admit, for the sake of argument, that Mr. Wilson has read the cases more carefully than have his many learned predecessors, it could, I think, be maintained that, by adhering too slavishly to what the judges have said, rather than regarding what they have actually decided, Mr. Wilson has produced a rule of impeccable verbal clarity, but of uncertain content. At p. 517 of the article Mr. Wilson asserts that, "mistake can be established if . . . A can prove to the satisfaction of the court that he did not intend to contract with B, and that B was aware of the fact. Conversely a plea of mistake will fail where the mistake is as to attribute and not identity. If a person intends to deal with an identifiable party it is irrelevant that he would not have been willing to do so if he had been aware of the other's reputation or bank balance." A brief footnote reference at this point, reading, "Or aware of his name, for this too is only an attribute, as pointed out by Dr. Glanville Williams in 23 Can.B.R. 271," is Mr. Wilson's only indication that he has considered Dr. Williams' thoughtful analysis of this perennially fascinating problem.

The basic difficulty is, of course, the meaning of the words, "he did not intend to contract with B." Unless one adopts a wholly objective view of the basis of contract and denies any significance whatever to consensual elements, there can be no contract between A and B if A does not intend to deal with B and B is aware of that fact. A's intention not to deal with B is not, however, as Mr. Wilson assumes, simply a question of fact; it is, rather, a mixed question of fact and law. Where B is fraudulently misrepresenting himself in some material respect, it is equally true to say that A intends to contract with B (the person B claims to be) and that A does not intend to contract with B (the person B actually is). As Dr. Williams has demonstrated, if we were able to explore A's mind, we should find that A actually thinks he is contracting with, and intends to contract with, a person who has some attributes belonging to B and some that do not. The statement, "A does not intend to contract with B" must, therefore, be given some special legal meaning, or it will have no meaning at all. Since we must accept, as a correct statement of the law, the proposition that a mere mistake as to B's attributes does not prevent the formation of a contract, mistake as to identity must be defined in some manner that sets it off sharply from mere mistake as to attributes; this the article fails to do.

Dr. Williams, on the other hand, uses modern semantic theory to show that, fundamentally, no distinction can be made between identity (or essence) and attribute. A mistake as to identity, in order to be defined at all, must be defined as a special case of mistake as to attributes. He therefore defines as a mistake as to identity any material confusion by A, to B's knowledge, of B's actual attributes with those of some other identifiable person, C, of whose existence A has independent knowledge. Dr. Williams draws an admittedly arbitrary line between confusion of the attributes of two specific, identifiable persons and merely believing B has attributes which he does not possess, but which are not those of any other specific, identifiable person. To be sure, this rule cannot reconcile all the cases, but then no one can feel

equally confident of the correctness of all of them. The rule is, moreover, actually capable of yielding the same results when applied to a given set of facts by different persons, which can hardly be said of Mr. Wilson's rule or those of the majority of the writers of textbooks. Mr. Wilson states at p. 525: "The final decision on this point [whether or not A intended to contract with B] must be one of fact, based on the evidence of each particular case," but could a jury reasonably be expected to reach a conclusion on a question so stated?

Mr. Wilson asserts at p. 528, "The contention that the 'third identifiable person' method is the only possible method of proving mistake as to identity cannot be supported." Nevertheless, what other meaning than that suggested by Dr. Williams can Mr. Wilson ascribe to the statement, "A does not intend to contract with B" which would distinguish clearly between a mistake as to identity and a mere mistake as to attributes? Far from being merely a method of proving mistake as to identity, the "third identifiable person" appears to be the sole factor which differentiates, in a substantive sense, between the two kinds of mistake.

Yours very truly,
W. D. GOODMAN.

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Canada.

Mr. J. F. Wilson has replied as follows:

Mr. W. D. Goodman presents a carefully argued case in support of the views of Dr. Glanville Williams and rightly draws attention to the inevitably weak point in any test for mistake—the distinction between identity and attribute. Two main criticisms are levelled at the theory advanced by the present writer in an earlier article. First, that it does not sharply distinguish between identity and attribute, and, secondly, that its application would result in varied results when applied to a given set of facts by different persons.

Mr. Goodman then suggests that these flaws can be remedied by the adoption of the test proposed by Dr. Williams, who "defines as a mistake as to identify any material confusion by A, to B's knowledge, of B's actual attributes with those of some other identifiable person, C, of whose existence A has independent knowledge. Dr. Williams draws an admittedly arbitrary line between confusion of the attributes of two specific, identifiable persons and merely believing B has attributes which he does not possess, but which are not those of any other specific, identifiable person." Presumably Mr. Goodman would not go so far as to argue that this test would work automatically, and that whenever it is proved that B is aware that A believes him to have an attribute possessed only by C—however immaterial that attribute may be in relation to the contract—there can be no contract. Such a proposition is certainly not supported by the cases. Qualifications must be introduced and a line must be drawn between attributes which are vital and attributes which are immaterial to the formation of the particular contract. Mr. Goodman recognises this limitation by referring to a "material" confusion of attributes.

The test now appears to be no more than the "third identifiable person" theory in another guise. The court is certainly relieved of the difficulty of distinguishing between identity and attribute, but must now distinguish between attributes which are material and those which are immaterial in a particular set of facts. The proposed test does not, and cannot, give any guidance on how this decision is to be made. Moreover its application to any given set of facts is equally prone to produce differing results when applied by different persons. The introduction of the additional point of law by

Mr. Goodman, therefore, would not appear to achieve the required degree of either clarity or precision. Moreover Mr. Goodman at the outset requires us to accept as a preliminary point of law the very test which he is trying to establish, and which has, as yet, found no support in decided cases.

In conclusion it is interesting to note that Mr. Goodman opens his argument by conceding the main point in our own case, that the "third identifiable person" theory is only a method of proving mistake. He says, "Unless one adopts a wholly objective view of the basis of contract and denies any significance whatsoever to consensual elements, there can be no contract between A and B if A does not intend to deal with B and B is aware of the fact." After such an auspicious opening it is disappointing to find that this generalisation only applies when A believes B to have a material attribute belonging to C, and B is aware of the fact. Why is it necessary to introduce such a limitation, when there is no support for it in decided cases? It has already been acknowledged that the "third identifiable person" test is by far the most effective method of proving mistake, but there seems no reason why other less clear-cut tests should not be allowed if they will convince the court of the absence of any intention of dealing with the particular legal entity before it.

REPORTS OF COMMITTEES

Occupier's Liability

The Third Report of the Law Reform Committee (Cmd. 9305) deals with a topic of great interest to all who are concerned with the common law—the liability of occupiers of property to invitees, licensees, and trespassers. This is a field of " lawyer's law " which, although untouched by statute, has acquired a bad reputation. The broad and simple principles established by our great Victorian judges have been obscured by over-refinement and subtlety. As Professor Lawson has noticed (*The Rational Strength of English Law*), when English law makes a mistake it is usually due to an excess rather than to a lack of rationality. Now the Law Reform Committee has had to recommend the drastic solution of a statute to amend and codify the law—a possibility which, as Dean Prosser has recently remarked in another connection, is likely to make many people cringe.

The main recommendations of the Committee may be surveyed under two heads.

A—Occupier's Liability towards Persons Entering on His Premises

Here a distinction is naturally drawn between lawful but non-contractual visitors, contractual visitors, and trespassers.

Lawful but non-contractual visitors

On this subject the Committee make the radical (but scarcely unexpected) suggestion that the present distinction between invitees and licensees should be abolished. Instead the occupier of premises (a term which should be defined to include movable structures) should owe a duty (" the common duty of care ") to every person coming upon the premises at his invitation or by his permission express or implied, to take such care as in all the circumstances of the case is reasonable to see that the premises are reasonably safe for use by the visitor for the purpose to which the invitation or permission relates. Further, persons entering premises under some statutory or other lawful right of entry, or persons entering premises provided for the use of the public, shall be deemed to have the permission of the occupier.

The following further points about the proposed common duty of care should be noted:

(i) It should be a question of fact whether the occupier has discharged the duty in any particular case, but in general a convenient

guide will be found in the standard which the present law requires of invitors. The tribunal of fact should be asked whether the occupier has taken reasonable care to see that the premises are reasonably safe, in determining this question it will be helpful to ask whether there was any unusual danger, the unusualness or otherwise of the danger being considered in relation to the character of the premises as well as in relation to the character of the visitor and the purposes for which he came. To this extent the Committee approve of the decision in *London Graving Dock* v. *Horton.*

(ii) The common duty of care should be capable of extension, modification, or exclusion by any representation or condition attached to the invitation or permission. The occupier will also have the defences of *volenti non fit injuria* and contributory negligence. It is in this way that the Committee meet the objection that the imposition on occupiers of a positive duty to take reasonable care for the safety of their visitors would impose an unreasonably heavy burden in those cases in which the visitor was a mere licensee permitted to use the premises entirely as a matter of grace (*e.g.*, a person taking a short cut). The Committee rejected the possibility of treating this class of case as an exception to the proposed general rule prescribing a uniform standard of care, and instead thought that a better result would be achieved if the courts were free to infer from the facts of any particular case that the permission to enter had been given and accepted on the footing that the visitor was to assume the risk of any damage to himself. This seems to be an acceptable compromise.

(iii) As a consequence of this approach the Committee necessarily disapprove of that part of the decision in *Horton's* case in which it was held that notice to or knowledge by the invitee of the risk—provided he recognises the full significance of it—should exonerate the invitor. The widespread and unanimous disapproval of this decision thus receives weighty support. The Committee suggest that in *Indermaur* v. *Dames* Sir James Shaw Willes never meant to decide that proof of warning or notice of the risk should as a matter of law put the plaintiff out of court. Appreciation of the risk should be only one of several factors which the court might find relevant in deciding whether the defendant had discharged his duty or the plaintiff had been guilty of contributory negligence.

(iv) The Committee are dubious about the value of the very widely phrased statements in *Thomson* v. *Cremin* to the effect that the duty of an invitor is personal in the sense that he cannot delegate its performance to an apparently competent independent contractor. They recommend that it should be a question of fact in each case whether the occupier has acted reasonably in entrusting the performance of the work to an independent contractor and in taking such steps as are practicable to satisfy himself that the work has been properly done.

(v) The widely criticised decisions in *Fairman* and *Jacobs* should be replaced by a statutory provision to the effect that a lessor of premises who remains in occupation of the means of access to the part demised should owe the common duty of care to any third party lawfully using the means of access.

It is clear that these recommendations are by far the most important and interesting part of the report. They have been made after an elaborate and patient analysis of the relevant factors—legal, social, economic and political—and no more can be attempted here than the briefest of summaries. On the one hand the Committee recognise that there is a widespread feeling that so long as the institution of private property exists there is a very real difference between those lawful visitors in whose presence the occupier has a material interest (whether or not that interest be shared by the visitor) and those visitors who are on the premises entirely for their own purposes and whose presence is due entirely to the occupier's tolerance and good-will. No doubt the explanation of or at least the usual justification for this distinction is that the entrant who wishes to acquire a greater degree of protection than the cold neutrality afforded to a licensee must in some way furnish consideration for the occupier's assumption of this stricter duty. The imposition of an affirmative duty requires the payment of a price. On the other hand the Committee have little difficulty in showing that the present law has led to some subtle refinements and unfortunate distinctions, *e.g.*, the social guest and the tenant's visitors are generally regarded as being unhappily placed in the category of licensees. It is also doubtful whether the hypothetical ordinary man—the arbiter of prudence in these matters—really regards these distinctions as relevant to the degree of care which lawful visitors are entitled to expect. The lengths to which the Committee were prepared to go can perhaps be seen most clearly if their recommendations are studied in the light of the Recorder of Oxford's minority report. (It must add considerably to the weight of the majority report that there should be only one dissentient to its conclusions.) In brief, he opposes any change on the ground that the present law (although imperfect in theory) does not on the whole work injustice; its rules have the great advantage of being reasonably clear and certain, whereas the proposed common duty of care would cause uncertainty until a new body of case law had been evolved.

We can survey the other points in the Committee's Report more briefly.

Contractual visitors

The present law seems to draw a distinction between contracts directly involving the use of premises and those for some other object to which the use of premises was incidental or ancillary, and to impose a higher liability on the occupier in the former than in

the latter case. The value of this distinction has become doubtful since the decision in *Thomson* v. *Cremin* and in any case (as the Committee remark) it is questionable whether the endless variety of forms which contracts for the use of premises take can really be analysed into two distinct classes. There will probably be general support for the recommendation that (in the absence of an express clause in the contract) the occupier's duty should be measured by the common duty of care.

Trespassers

No change is suggested in the present law relating to adult trespassers. A minority of the Committee appear to have favoured some relaxation of the present rules where infants are concerned, but no member felt strongly enough to dissent.

B—Injuries to Third Parties through Breach of Landlord's Obligations to Repair

Here the Committee recommend that where a lessor is bound by contract or statute to keep demised premises or any part thereof in repair, and in consequence of any breach by him of that obligation any member of the tenant's family, or person residing with or lawfully visiting the tenant sustains injury, the person injured should have the same right of action against the landlord as he would have had if he himself had been the tenant. It will be seen that this provision is carefully worded to go as far as (but no further than) reversing the decision in *Cavalier* v. *Pope*. It is perhaps unfortunate that the Committee did not consider the difficulties raised by cases like *Cheater* v. *Cater*.

One final reflection may be permitted. The cost of printing and publishing this report was £50 10s. Criticisms are sometimes made of our methods of law reform: may we not take some pride in a tradition which enables the public to obtain the time and services of men of the highest qualifications at so small a cost?

R. F. V. Heuston.

The Home Office and Scottish Home Department. Report of the Departmental Committee on the Adoption of Children, presented to Parliament, September, 1954. Cmd. 9248. Stationery Office, 3s. net.

The Departmental Committee appointed by the Home Secretary in January, 1953, under the chairmanship of Sir Gerald Hurst, Q.C., T.D., had to consider not the drastic amendment of a branch of

the law that was working badly, but comparatively minor modifications in adoption legislation that, after twenty-six years in operation, appeared on the whole to be working smoothly, and on a scale far in excess of anything envisaged by its first promoters. The number of adoption orders made in this country [1] rose fairly steadily from less than 3,000 in 1927 to more than 9,000 in 1940; by 1942 it had leapt to nearly 12,000, and reached in 1946 an all-time peak of 23,500. By 1952 the annual rate of orders made had dropped to 15,000. In all, for the period 1927 to 1952, more than 280,000 adoption orders had been made, and the Hurst Committee is satisfied [2] that the general result has been " to increase immeasurably the happiness and well-being of probably over a million members of the community."

The history of legal adoption in this country provides an example which must be unusual, if not quite unparalleled, of the complete failure of authority, executive and legislative, no less than judicial, to gauge the force and direction of social pressures. For this the judges must bear the initial responsibility, since it was they who persistently upheld the inalienability of parental rights, however neglectful [3] or incapable [4] of parental duties parents might have proved. But although the first committee appointed in 1920 [5] to consider amendments to the law, declared in favour of provisions for legal adoption,[6] not until after another committee [7] had reported in the same sense [8] and submitted draft legislation, was adoption legalised by statute.[9] Even the Tomlin Committee, reporting in 1925, thought that far more people would be anxious to get rid of children by way of adoption than would be prepared to adopt them. The reality has proved the exact opposite; the demand by suitable adults for children to join their families permanently far exceeds the number of children available for adoption.[10] Such a background of consistent misjudgment strongly reinforces the

[1] *i.e.*, England and Wales for the period from 1927 to 1930, and England, Wales and Scotland from 1931, when the Scottish system of legal adoption came into operation.

[2] Para. 23, p. 6.

[3] See, *e.g.*, *Barnardo* v. *McHugh* [1891] A.C. 388; *Barnardo* v. *Ford* [1892] A.C. 326. The worst effects of these and similar judicial decisions were mitigated by the Custody of Children Act, 1891, providing that parents who have abandoned or deserted their children or allowed them to be brought up at the expense of others must satisfy the court that, having regard to the welfare of the child, they are fit to have its custody, before this will be awarded to them.

[4] See, *e.g.*, *Humphreys* v. *Polak* [1901] 2 K.B. 385.

[5] Under the chairmanship of Sir Alfred Hopkinson, K.C.

[6] Cmd. 1254.

[7] Under the chairmanship of Tomlin J.

[8] Cmds. 2401 and 2469.

[9] The Adoption of Children Act, 1926, which came into operation January 1, 1927. For Scotland the corresponding statute came into operation on January 1, 1931.

[10] It is fair to add also that the number of children who do not and probably never will have a family background is probably even more greatly in excess of those adopted. See para. 19, p. 4, and *post*.

present committee's plea for more research into the effects of the present system.[11]

The basic dilemma of adoption law is that, beyond the field of its operation, there are few checks upon the power of adults to consider their own interests and desires to the exclusion of the child's welfare. With very rare exceptions,[12] no child is available for adoption unless his parents voluntarily give their consent and renounce for ever all rights in him. Of the children actually adopted, more than one-third have been placed outside their own families either directly or by third parties who are not adoption societies or local authorities.[13] Too stringent safeguards for the child legally adopted will simply result in the substitution of *de facto* for legal adoption, and whoever gains by such arrangements, the child must almost invariably suffer.

Nevertheless, the situation in which potential adopters far outnumber available children makes it, within limits, practically expedient as well as morally right to treat as the first and paramount consideration in adoption law the welfare of the children adopted, rather than the interests and demands of adults. The underlying *Leitmotiv* of the Hurst Committee's penetrating report is, indeed, the welfare of the children adopted. It is in writing of direct or third party adoptions that this theme becomes most explicit; the committee says [14]: "Whether the third party acts chiefly for the benefit of the mother or of the adopters the interests of the child do not usually receive much, if any, consideration." The report specifically refers to "the deplorable cases in which a doctor acts as third party for the benefit of a patient whose neurotic condition he seeks to remedy or whose marriage he hopes to stabilise by this means," and proves the point by quoting from a letter written by a doctor to a voluntary worker asking for a child to be made available for adoption by a particular couple.[15] This

[11] Para. 23, p. 6, points out that at least one local authority and a few voluntary bodies have undertaken research and expresses the hope that there will be an extension of this work, with publication of the results as far as possible. Para. 46, p. 12, draws attention to the fact that no careful research into the comparative results of adoptions carried out through the agency of adoption societies and local authorities or third parties, or arranged directly, appears to have been undertaken. Other references may be found in the report to the lack of information available.

[12] If the court is satisfied that the parent or guardian whose consent is required has abandoned, neglected or persistently ill-treated the child, or a person liable to contribute towards the child's maintenance has consistently neglected or refused to do so, or that anybody whose consent is required cannot be found, or is incapable of giving consent, or that the consent is unreasonably withheld: Adoption Act, 1950, s. 3. The courts have placed a very restricted interpretation on the requirement that consent is unreasonably withheld, and have held that consideration of the child's welfare is irrelevant to this issue. The matter is discussed below.

[13] Para. 45, p. 12.

[14] Para. 43, p. 11.

[15] The passages relevant to adoption read:

"Some time ago they had an adopted child 'on appro.' but Miss —— decided they were not suitable to keep it."

"Mrs. X tells me that her husband threatens to leave her unless another

document should be read and its horrifying implications pondered by all connected in any capacity with the welfare of children.

Among the recommendations bearing directly upon the interests of the child are those that every adopted child should be told at a very early age of his adoption, and that all adopters must undertake to bring up the child in the knowledge that he is adopted.[16] The previous practice of concentrating more upon the health of the child than of the adopters should be reversed; all applicants should be required to undergo a medical examination by a doctor appointed by the court and paid from public funds, so that the court shall know, before making an adoption order, if there is reason to suspect that an applicant may be expected to die or become invalid before the child reaches independence.[17] Recommendations are also made for rendering the medical reports on the child [18] more comprehensible to the applicants,[19] and the authorities are urged not to hesitate in arranging for the adoption of children who are not completely healthy, provided the applicants are given the fullest information about them.[20] Normally, the committee points out, adoptions should be by a married couple, and only where there are special reasons should a sole applicant be allowed to adopt a child.[21] All applicants should be at least twenty-one years of age [22] (but not necessarily, as at present, twenty-one years older than the child), and one of an adopting couple should be at least twenty-five.[23] At the other end of the scale, the committee is disturbed by the " extremely widespread " granting of adoption orders to grandparents, notwithstanding the observations of Vaisey J. in *Re D. X.*,[24] and suggests that guardianship by the grandparents would be more appropriate.[25]

Attention is drawn to evidence that inquiries by the guardian *ad litem* lay too much emphasis on material conditions at the expense of the far more important factor of the emotional relationship between the child and the adopters. The committee adds [26]: " We have had evidence about cases where adoption orders have been granted to unsuitable adopters, and it was clear that an unskilled guardian *ad litem* had failed in his duty to investigate all

baby is forthcoming, and adoption is the only way. I feel myself that, although the home is not ideal, a baby might go a long way to settle down the whole family and without itself suffering in the process."

" With such a brisk seasonal trade in ' illegits ' I feel one might perhaps be spared!"

16 Para. 22, p. 6, and paras. 150–4, pp. 39–40.
17 Paras. 140–1, pp. 36–7, and Appendix III.
18 These are not required when he is adopted by a parent or relative.
19 Paras. 143–4, p. 37, and Appendix IV.
20 Para. 21, p. 5.
21 Paras. 178–81, pp. 46–7.
22 Except where the father or mother of the child is a party to the application.
23 Para. 149, pp. 38–9.
24 [1949] Ch. 320.
25 Para. 148, p. 38, and para. 283, p. 70.
26 Para. 75, p. 20.

the circumstances of the case and report them to the court." Stressing that the court is required to be satisfied that any adoption order made will be for the welfare of the infant, the committee concludes [27] that some courts are satisfied by reports which contain little information in support of the recommendation of the guardian *ad litem*.

Disquieting evidence about children sent abroad for adoption by persons unknown to them leads to a recommendation [28] that it should be an offence for any person (except a parent, guardian or relative of the child) to attempt without a licence to remove, with a view to adoption (whether *de jure* or *de facto*) a child from Great Britain to any destination outside the British Islands unless the child has entered Great Britain as a member of his household. It is also suggested that police at airports and seaports should be empowered to prevent the departure of children reasonably suspected of being taken abroad for *de jure* or *de facto* adoption. Precautions of a stringent nature are clearly justified to prevent traffic of this character.

A fairly drastic amendment of the present system of licensing [29] is recommended,[30] as well as repeal of the requirement that applicants must be resident in this country.

The committee records its belief that it was expected that the power to dispense with the consent to adoption normally required from parents, guardians or other persons concerned, on the ground that such consent was unreasonably withheld, would tend to focus the attention of courts on the welfare of the child. Two recent judgments,[31] however, make it clear that in the present state of

[27] Para. 86, p. 22.

[28] Para. 177, p. 46, and para. 224, pp. 57–8.

[29] Adoption is possible only when the applicants are domiciled in this country and (at present) when both applicants and child are resident here. The only method by which persons not domiciled and resident here can have a child transferred to their care and take him overseas is by licence. The exception is the mother of an illegitimate child who has since married a man domiciled elsewhere. Not being domiciled here, she cannot adopt her child, but needs no licence to take him abroad. See para. 168, p. 44. The committee recommends the abolition of the residence qualification for would-be adopters, but this still leaves room for licensing provisions in respect of those who are not domiciled here and are not the mothers of the children.

[30] Paras. 169–177, pp. 44–46.

[31] The reference seems to be to *Hitchcock* v. *W. B.* [1952] 2 Q.B. 561, where the father of a legitimate child refused consent to his adoption by those who had fostered him for the preceding 18 months. The mother had consented. The father, who was engaged in a criminal career, appears not to have seen the child after the age of six weeks; he could neither provide a home for him nor maintain him, but he wanted him to be withdrawn from his foster-parents and put into a nursery home, to the cost of which the father would make some contribution. The Divisional Court held that his consent to adoption was not unreasonably withheld, and that in considering whether it was, it was not the welfare of the child but the attitude of the parent that must be considered. The decision was approved and followed by the Court of Appeal in *Re K.* [1952] 2 All E.R. 877, where the child's mother, herself an infant living in adultery with a married man, was held entitled to withdraw the consent she had given to the child's adoption by the foster-parents with whom she had placed him.

case law the question to which courts must direct their attention is whether the parent is maintaining an attitude which it is unreasonable for him as a parent to hold, and not primarily whether the child's welfare is likely to be promoted more by the grant of an adoption order without the parent's consent than by its refusal. Fortunately, the committee rejects the suggestion that wording similar to that in section 1 of the Guardianship of Infants Act, 1925, should be adopted; the courts showed in *Re Carroll* [32] to what results this provision may be held to lead. Instead, the committee recommends that the provision that consent may be dispensed with if unreasonably withheld be replaced by one that consent may be dispensed with in the case of a parent who has made no attempt to discharge his responsibilities.[33] Given the jealousy with which the courts uphold the rights of parents in defiance of other considerations, some misgivings may be felt that even this wording may receive a strict interpretation, and very slight attempts by parents in the distant past to discharge their responsibilities may qualify them to veto their children's well-being. A provision that consent is dispensable where the parent has made no continued adequate attempts to discharge his responsibilities might ensure the desired result.

Perhaps the most far-reaching recommendations contained in the report are that local authorities should be empowered to arrange for the adoption of any child without the necessity of receiving the child into care under the Children Act, 1948 [34] (but subject to consideration by the equivalent of a Case Committee [35]), and that they should consider making special contributions towards the expenses of those adoption societies which employ trained workers.[36] Doubtless the result anticipated is that the more efficient societies will be enabled to broaden the sphere of their operations and improve their contacts with local authorities, whilst the latter may gradually be able to profit by their experience and extend the field of official placings at the expense of direct and third party placings. No specific recommendations are made in respect of the activities of Adoption Societies, since most of them are financially unable to carry any further burdens, and the effect of such recommendations would be to close a number of them. Some tightening up of the regulations applying to adoption is, however, recommended, with a view to ensuring that a more active part is played by the Case Committees.[37] The discretion of societies to make their own rules

[32] [1931] 1 K.B. 317, and particularly Slesser L.J. at p. 355, where he declared that since no question could arise between the parents concerning their respective rights over an illegitimate child, such a child was outside the welfare clause.

[33] Para. 120, p. 31.

[34] Para. 24, p. 7.

[35] Para. 25, p. 7.

[36] Para. 40, p. 10.

[37] Paras. 274–5, p. 68.

is not to be weakened, though one rule is mentioned [38] that has attracted some attention and appears unfortunate, *viz.*, that some societies do not place children with would-be adopters who already have children of their own. The importance of applicants knowing all that can be told them about the physical and mental health of the child is also stressed,[39] although some adoption societies are known not to pass on full information to adopters.

The chief criticisms of local authorities are of failure of co-operation between the various departments interested in child welfare,[40] and between different authorities,[41] and excessive secrecy. It is recommended [42] that any court refusing an adoption order should be empowered to bring the child concerned before a juvenile court for consideration whether he is in need of care and protection. There are recommendations for the tightening up of the prohibitions on advertisements [43] and payments [44] in respect of adoptions, and for more prosecutions [45] of third parties who fail to notify placings of children.

In the short space available it has been possible to mention only a few of the more important recommendations made in this enlightened and searching report. Every one of its 284 paragraphs is deserving of the most careful consideration, although the main recommendations are also summarised at the end. There are, for example, several recommendations for the improvement of the practice and procedure of the courts concerned with adoption, as well as of the reports by the guardian *ad litem*. One other recommendation that should perhaps be mentioned is that an adopted child should, at but not before reaching the age of twenty-one, be able to trace his origin,[46] but that no one else should be able to do so without an order of the court.[47] Since the report appeared some publicity has been attracted by a regrettable incident in which a brother and sister who had been adopted into different families and bore different names, in all innocence went through a ceremony of marriage and had two children before discovering their natural relationship. Although such cases are likely to be rare in any event, it may be hoped that this and other matters will receive the attention of the Standing Committees which the committee recommends [48] should be set up, on the lines of those dealing with probation, to advise the Secretaries of State on matters concerning adoption.

O. M. Stone.

[38] Para. 33, p. 9.
[39] Para. 21, p. 5
[40] Para. 65, p. 17, and para. 255, p. 64.
[41] Para. 27, p. 8.
[42] Paras. 125–8, p. 33.
[43] Paras. 237–8, p. 60.
[44] Paras. 231–6, pp. 59–60, and p. 265, p. 66.
[45] Para. 51, p. 13.
[46] Paras. 201–2, pp. 53–4.
[47] Paras. 203–4, p. 54; and *cf.* paras. 277–9, p. 69.
[48] Para. 184, p. 48.

NOTES OF CASES

Boundaries between Parliament and the Courts

The litigation that resulted from the recommendations contained in the First Periodical Report of the Boundary Commission for England (Cmd. 9311 (1954)) under the House of Commons (Redistribution of Seats) Act, 1949, raised several issues of constitutional importance. In what circumstances (if any) may a court examine the validity of subordinate legislation that is subject to proceedings in Parliament? Is a distinction to be drawn for any purpose between Orders in Council and other statutory instruments? Has a court jurisdiction to award an injunction against a Minister of the Crown? These were among the questions touched upon but not conclusively answered in the courts.

The 1949 Act substantially consolidates the provisions of the House of Commons (Redistribution of Seats) Acts, 1944 and 1947. Each of the Commissions set up under the 1949 Act consists of three *ex-officio* members (the Speaker, who is chairman, the Registrar General and the Director-General of Ordinance Survey) and two other members appointed by Ministers; the practice has been to appoint members who are not active politicians. A Commission is required to keep under review representation in the House of Commons and to submit to the appropriate Secretary of State at intervals of not less than three or more than seven years a general report on the redistribution of constituencies in the area with which it is concerned, and it may make recommendations on the boundaries of individual constituencies or groups of constituencies from time to time. Before commencing a general review it must give public notice of its intention, publish its provisional recommendations locally and consider any representations submitted to it. It may cause local inquiries to be held; the Commission for England held seven local inquiries through Assistant Commissioners appointed *ad hoc*.

In formulating its proposals a Commission is to observe the rules set out in the Second Schedule to the Act. These rules prescribe, *inter alia*, that the number of constituencies for Great Britain *shall not be substantially greater or less than* 613 (of which not less than seventy-one shall be Scottish and not less than thirty-five Welsh) and for Northern Ireland shall be twelve (r. 1); that every constituency shall return a single member (r. 2); that, so far as is practicable, having regard to the foregoing rules, constituencies shall not cut across existing local government boundaries (r. 4); that the electorate of any constituency shall be *as*

near the electoral quota as is practicable having regard to the foregoing rules, and that a Commission may depart from the strict application of rule 3 in order to avoid excessive disparities between the electorate of a constituency and neighbouring constituencies or the electoral quota (r. 5); that a Commission may depart from the strict application of rules 4 and 5 if this seems desirable for special geographical reasons (r. 6); and that the expression " electoral quota " means, in relation to Great Britain, the quotient of the total electorate of Great Britain divided by the number of constituencies in Great Britain at the date when the general revision is announced.

The Act provides that as soon as may be after the Boundary Commission has submitted a report to him, the Secretary of State *shall* lay it before Parliament, together with (unless the report recommends no changes) the draft of an Order in Council for giving effect to its recommendations, with or without modifications (s. 2 (5)). The draft of the Order in Council may make provision for any consequential or incidental matters, and if it incorporates modifications of the recommendations the Secretary of State must lay before Parliament a statement of the reasons for the modifications. When the draft is approved by resolution of each House of Parliament, the Secretary of State *shall* submit it to Her Majesty in Council who may make an Order in terms of the draft. The validity of an Order in Council made under the Act and reciting that a draft thereof has been approved by resolution of each House shall not be called in question in any legal proceedings whatsoever (s. 3).

The Boundary Commission for England reported that, having been informed that the number of constituencies for Scotland and Wales would probably remain at seventy-one and thirty-six respectively, it decided to proceed on the basis that the number of constituencies for England should not be substantially greater or less than the existing number of 506 (613–71–36). It therefore adopted an electoral quota of 57,122, calculated by dividing the total *English* electorate by 506. Yet rule 7 had prescribed that the quota should be arrived at by dividing the total electorate of *Great Britain* by the existing number of constituencies in *Great Britain*. This would have given an electoral quota of 55,670 and a basic number of 519 English constituencies instead of 506. The Commission apparently chose to found its recommendations on the assumption that 519 would be a substantially greater number than 506. The effect of its final recommendations, which provided for 511 constituencies in England, was to maintain, through a deviation from the prescribed electoral quota, the under-representation of England in relation to Scotland and Wales. Two points may be noted: the Commission for England had proceeded on the same basis as this in its 1947 Report; and the effect of the 1954

recommendations was to bring more than 80 per cent. of the proposed English constituencies within 10,000 of the electoral quota for Great Britain which the rules had prescribed.

In the result the Home Secretary accepted all of the Commission's recommendations and laid the drafts of a number of Orders in Council before the House in order to implement them. In two cases the validity of the Commission's recommendations was challenged in the courts by voters in the constituencies affected. In *Hammersmith Borough Council* v. *Boundary Commission for England* (*The Times*, December 15, 1954) electors moved for a mandatory injunction requiring the Commission to inform the Home Secretary that its recommendations for the creation of a new constituency were not in accordance with the provisions of the Act and were *ultra vires*. Harman J. dismissed the motion on the ground that the scheme of the Act left no room for judicial intervention. The proceedings in the second case, *Harper* v. *Home Secretary*, had repercussions which in retrospect seem remarkable. *The Times* wrote of " a desperate appeal to the courts on technical points "; a weekly journal dwelt upon the reactionary implications of judicial review; a Member of Parliament discerned " the most serious constitutional crisis which has occurred since the reign of Queen Anne "; the Leader of the House of Commons spoke of " grave matters "; and a special meeting of the Cabinet was summoned. On December 17, 1954, the plaintiffs had issued a writ claiming declarations that the Report of the Commission did not comply with the rules set out in the Act and was not a " report under the Act," and that the defendant was not bound to submit the Draft Parliamentary Constituencies (Manchester, Oldham and Ashton-under-Lyme) Order, 1954, giving effect to recommendations in the Report, to Her Majesty in Council. (By this time the draft Order had already been laid before Parliament and had been approved by resolutions of both Houses.) On the same day the plaintiffs applied *ex parte* for an interim injunction to restrain the defendant from submitting the draft Order until the hearing of the motion. Roxburgh J. granted the injunction sought, holding (*The Times*, December 18) that it was permissible for the courts to intervene in a proper case up to the time when Her Majesty made the Order in Council, that the court had jurisdiction to award an injunction against the Home Secretary in the situation under consideration, that to do so would not be to trespass upon the functions of Parliament and that there was a prima facie case that the Report did not give effect to the rules laid down in the Act.

Three days later the Court of Appeal ([1955] 2 W.L.R. 316; [1955] 1 All E.R. 331) reversed Roxburgh J.'s decision. Sir Raymond Evershed M.R. (with whose judgment Jenkins and Hodson L.JJ. concurred) held that the Commission had not departed from the rules that it had to follow and that it was in any event for

Parliament, not the courts, to pass judgment on the course that had commended itself to the Commission; though he would not express an opinion on what the court might do "if the Commission on the face of a Report made recommendations which were manifestly in complete disregard of the Act of 1949 and of the rules made thereunder." He also doubted whether an injunction would lie against the Secretary of State in his official capacity, having regard to the terms of the Crown Proceedings Act, 1947.

With respect, it is difficult to accept the view that the Commission observed the rules laid down for it. The rules would indeed have imposed upon the Commission irreconcilably conflicting duties if the adoption of the prescribed electoral quota for Great Britain would have in fact resulted in a number of constituencies substantially in excess of 506. The Commission would then have had to choose between disobeying rule 1 and jettisoning the electoral quota. But since the adoption of the quota prescribed by the rules would have led only to an increase of just over two per cent. in the number of English constituencies, it is hard to see why the Commission should have been warranted in disregarding the quota in the present case. And a court of law is surely competent to determine that an increase of thirteen over 506 is not substantial. Yet even if it is conceded that the Commission acted beyond its authority in this respect, it would be going too far to contend that this irregularity, the consequences of which were relatively slight, so vitiated its Report as to deprive it of the quality of "a report made under the Act" and to infect with invalidity the Orders in Council drafted to implement its recommendations.

If the Commission had in fact flagrantly disregarded the rules contained in the Act, at what stage and by what means (if any) might a court properly have intervened? The Report of a Commission is not published until it has been submitted to the Secretary of State, and by that time the Commission is *functus officio*; hence a prohibitory injunction could not lie to it, and the device of seeking a mandatory injunction, employed in the *Hammersmith* case, is open to the same objection and is, moreover, too artificial to be countenanced. Could the Secretary of State be restrained from laying before Parliament an invalid Report and draft Orders in Council giving effect to it? The case of *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, shows that the courts will not necessarily be deterred from prohibiting further consideration of a scheme that is *ultra vires*, even though affirmative resolutions of both Houses are required before the scheme can have the force of law. The courts are better equipped than either House to determine questions of *vires* and neither House need regard the intervention of the courts as an unconstitutional encroachment upon its own functions. On the other hand the representation of the people has traditionally been the special concern of the Commons, and in this context it

would be imprudent for the courts to interfere. It is also relevant that the Act imposes a duty on the Secretary of State to lay the Report and any consequential Orders in Council before Parliament. In any event it is not clear how the jurisdiction of the courts could be invoked. As the Master of the Rolls suggested in the *Harper* case, an injunction would not have lain against the Secretary of State in his private capacity because he had not committed any breach of legal duty towards the plaintiffs. Nor, probably, could it lie against him in his official capacity, for section 21 (1) of the Crown Proceedings Act, 1947, provides that no injunction shall lie against the Crown and section 21 (2) that none shall be granted against an officer of the Crown if the effect of granting it would be to give relief against the Crown which could not have been obtained in proceedings against the Crown.[1] It would seem that the courts have no jurisdiction to grant an interim declaration in lieu of an interlocutory injunction against the Crown: *Underhill* v. *Ministry of Food* [1950] 1 All E.R. 591; so that there might be no means available for testing the validity of a draft Order under the 1949 Act before it had been submitted to Her Majesty in Council. Judicial review of an Order in Council made under the Act is excluded by section 3 (7) of the Act.

If the challenge is delayed until the draft Order has been approved by resolutions of both Houses, yet another barrier against access to the courts is erected. A court could not at this stage declare a draft Order to be invalid without declaring, expressly or by implication, that the Secretary of State ought not to tender certain advice to Her Majesty in Council. The constitutional objections to such a course are obvious; the Act, moreover, provides that the Secretary of State "shall," not "may," submit the draft Order after parliamentary approval has been given.[2]

There have been suggestions that the mere fact that both Houses have approved the draft of a subordinate legislative instrument makes it improper for the courts to pass on the validity of the instrument, either before or after it has been made. This proposition is not well-founded.[3] Resolutions do not have statutory force unless expressly given that effect.[4] If an Act says that a Minister shall have power to make a statutory instrument provided

[1] See Street, *Governmental Liability*, 140–1.

[2] The Australian cases in which injunctions have issued to restrain the submission of invalid State Bills for the royal assent have all arisen under constitutional provisions which *prohibited* the submission of a Bill unless prescribed requirements had been complied with: *Taylor* v. *Att.-Gen. for Queensland* [1917] St.R.Qd. 208; *Trethowan* v. *Peden* (1930) 31 S.R.(N.S.W.) 183; *Att.-Gen. for N.S.W.* v. *Trethowan* [1932] A.C. 526; *cf. McDonald* v. *Cain* [1953] V.L.R. 411; *Hughes & Vale Pty. Ltd.* v. *Gair* (1955) 28 A.L.J. 437.

[3] See Griffith and Street, *Principles of Administrative Law*, 118–9; Willis, *The Parliamentary Powers of English Government Departments*, 144–5; *R.* v. *Electricity Commissioners* [1924] 1 K.B. at 211–3.

[4] *Stockdale* v. *Hansard* (1839) 9 A. & E. 1; *Bowles* v. *Bank of England* [1913] 1 Ch. 57; Provisional Collection of Taxes Act, 1913.

that a draft thereof has been laid before Parliament and has been approved by resolution of each House, it should be open to a party with a sufficient legal interest to challenge the validity of the instrument in the courts after it has been approved, unless the subject-matter falls peculiarly within the special province of Parliament or unless judicial review is expressly excluded. Whether it would be proper for the courts to pass upon the validity of the draft while it still lay before Parliament is doubtful. If the instrument to be laid in draft is an Order in Council, the opportunities for judicial control may be further restricted, for the reasons stated above.

S. A. de Smith.

The Judicial Functions of Government Departments—Self-Denial by the Divisional Court

In *R.* v. *Minister of Housing and Local Government, ex p. Finchley Borough Council* [1955] 1 W.L.R. 29; [1955] 1 All E.R. 69, the local authority, acting under section 150 of the Public Health Act, 1875, served notices on the London Transport Executive requiring the Executive to make up parts of a roadway as owners and frontagers. The works not having been carried out, the local authority, in the usual way, undertook them and charged the Executive. The Executive, under section 268, appealed to the Minister on the ground that they were not "owners" within the meaning of the Act as the land was vacant, had no commercial purpose and could not be let at a rack-rent. The Minister allowed the appeal and ordered that no amount should be payable in respect of the land. The local authority applied for an order of certiorari to quash the Minister's decision.

Section 268 empowers the Minister, on appeal to him, "to make such order in the matter as to the Minister may seem equitable" and the order so made is binding and conclusive on all parties. If the local authority have commenced summary proceedings against the owner for the recovery of their charges, these proceedings are stayed by the appeal to the Minister. It was argued for the local authority that section 268 did not give the Minister power to determine whether the Executive were "owners" as this was a question of definition and of law and that his decision ought therefore to be quashed. If this had been done, then presumably the local authority would have continued their summary proceedings and the question would have been determined by quarter sessions or the High Court.

The Divisional Court unanimously refused the application for certiorari. Lord Goddard C.J. relied on *R.* v. *Local Government Board* (1882) 10 Q.B.D. 309 as showing that the Minister's powers under section 268 are "of the widest possible nature." Very

general words were certainly used in that case but the appellant's ground of objection there was that some of the work was unnecessary and the total payment demanded from him extremely heavy. It is doubtful if the Court of Appeal in that case considered whether the sort of question raised in the present case was one which it was proper for the Minister to determine. Of the other members of the Divisional Court, Cassels J. was of opinion, without elaboration, that the Minister was clearly empowered by section 268 to come to the conclusion, on the grounds stated, that it would be inequitable for the Executive to be required to make the contribution demanded. Devlin J., in the longest of the three judgments, said that the decision of an authority may be appealable "because the local authority has acted outside its powers, or because it has not done something which it ought to have done under the Act, or because the decision is unfair or unjust" and that there is nothing to exclude the Minister "once he has properly got seizin of the case, from reviewing any bad decision given in that case, no matter on what ground it was given." In his opinion, the use of the word "equitable" in the section did not mean that Parliament intended to exclude points of law from the purview of the Minister.

The effect seems to be to create two alternative courses for the determination of questions of law in these cases. If the owner wishes to dispute his legal liability to pay a charge, he can either resist the action of the local authority in the courts when the authority seeks to recover money by summary proceedings or he can appeal to the Minister. If the owner wishes to contest the reasonableness of the local authority's demands, he must go to the Minister. The interest of the decision is that the court chose to interpret the section so as to invest the Minister with the power of deciding questions of law. A contrary holding would not have been difficult to justify. As Devlin J. said: "I have no doubt that Parliament thought it unlikely that any points of law would arise. I have no doubt that if Parliament thought legal points would be likely to play a great part in inquiries of this sort, it would not have entrusted it to the Minister." It would have been in keeping with the attitude of the courts in many other cases to have said: "The local authority can require only 'owners' to meet these charges by the payment of a lump sum. The Executive was not such an 'owner.' Therefore the decision of the local authority to charge the Executive was invalid and was no decision. Since appeal to the Minister lies only from a decision of a local authority, there was no issue for the Minister to hear. Therefore his order was invalid—compare *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995."

The logic of the statutory provisions surely is that the Minister should have power to review the discretionary powers of a local

authority to perform certain functions and to fix certain charges. Lord Goddard said that the court had been told that the Minister found his powers under the Act, as interpreted by *R.* v. *Local Government Board* (above), most useful in relieving small property owners of their obligation to pay charges. But that case was not concerned with legal liability to pay. The Minister has, therefore, a dispensing power. But one would have thought that the courts would have been eager to distinguish such an administrative discretion from a Ministerial power to decide questions of law. It has always seemed, at least in recent years, that the courts have been reluctant to decide that the words of an Act are strong enough to empower an administrative authority to interpret statutory provisions. Yet in this case they seem to have embraced the opportunity of setting up a Minister as a proper person to determine questions of law. This inconsistency is the price that is paid for a linguistic approach to the problem of statutory interpretation. No doubt the other extreme is also unsatisfactory and it is no answer to say that the courts should try to "do justice." If the words of an Act clearly do not cover a situation, then it is not the function of the courts to invent a statutory provision. But if the "liberal" doctrine of interpretation is limited to an attempt to discover the intention of Parliament within the framework of the existing words, it will not be possible for a court to say: "Parliament did not intend these words to have the meaning we give them but we are bound by the symbols Parliament has used."

It is common to compare the attitude of the courts to the exercise of judicial powers by administrative authorities to the motion of a pendulum. At the moment that attitude more closely resembles the vivid blur of a metronome set to beat at its greatest speed.

J. A. G. Griffith.

Trading with the Enemy

In *Kuenigl* v. *Donnersmarck and Another* [1] McNair J. was confronted with some complex facts and a number of interesting questions including one hitherto undecided on the common law rules relating to trading with the enemy. It is with only the latter that this note is concerned, and the following facts have been selected as those which are strictly necessary for an appreciation of the point. In 1929 the first defendant agreed to pay to the plaintiff by instalments a large sum in gold marks, and the second defendant guaranteed the payments. This agreement was varied on terms unfavourable to the plaintiff by another agreement entered into in Germany in 1940 to which he and the two defendants were parties. The second defendant was a limited company incorporated in England, but which by the outbreak of war in 1939 had virtually

[1] [1955] 2 W.L.R. 82; [1955] 1 All E.R. 46.

no connection with this country and as from that date acquired (as McNair J. impeccably held) " enemy character " under the principles discussed in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*[2] The present action was brought by the plaintiff to enforce the 1929 agreement, and in face of a defence based on the 1940 agreement he replied that it could not in English law be regarded as the agreement of the company since from September 3, 1939, its directors or agents in Germany ceased to have any authority to act therefor. The company rejoined with the ingenious argument that for all purposes connected with trading with the enemy it was a person in Germany, and therefore its directors' contracts of agency were not abrogated as under them no intercourse, communication or benefit could take place or was required to take place across the line of war. In parenthesis it may be remarked that no question of private international law could have effectively arisen for apart from the overriding effect of the English policy rule[3] the directors' contracts with the company were almost certainly governed by English law *qua* the law governing the incorporation of the company.[4] McNair J. decided the issue in favour of the plaintiff. The learned judge said:

> " In my judgment it would be contrary to principle and to public policy as embodied in the trading with the enemy law to hold that a company incorporated under the laws of this country and registered here, and so having both an English domicile and British nationality, can cease to be in the eye of English law an English company subject to English law by reason of the fact of enemy control. Enemy control may operate to the prejudice of an English company by conferring upon it enemy character, but cannot confer benefit upon it exonerating it from the operation of English law. Could it be said that this English registered company could lawfully by English law, merely because it had acquired enemy character by means of enemy control, have, during the war, entered into contractual relations to supply a German armament firm with coal from its Beuthen mines, or that it could after the war ask the English courts to give effect to such a contract? Plainly not." [5]

In addition to the characteristics enumerated by the learned judge the company was clearly resident in Germany where it had its " centre of control," [6] but McNair J. derived " little assistance " [7]

[2] [1916] 2 A.C. 307. Presumably the relevant principles were Lord Parker's third and fourth propositions: [1916] 2 A.C. at p. 345.
[3] *Dynamit A./G.* v. *Rio Tinto Co., Ltd.* [1918] A.C. 291.
[4] *Cf. Risdon Iron and Locomotive Works* v. *Furness* [1905] 1 K.B. 304; [1906] 1 K.B. 49 (C.A.).
[5] [1955] 2 W.L.R. at p. 92.
[6] Dicey, *Conflict of Laws*, 6th ed., p. 127; Farnsworth, *The Residence and Domicile of Corporations* (1939), p. 88.
[7] [1955] 2 W.L.R. at p. 92.

from cases generally taken as establishing that proposition, dismissing them as " cases dealing with the residence of English companies for the purpose of income tax." [8] However the question falling for decision may not unfairly be stated as: whether or not a contract of agency betwen a British national domiciled in England but resident in Germany and a German national domiciled and resident in Germany is of necessity abrogated upon the outbreak of war. McNair J. referred to two authorities as " suggesting " the error of the company's argument. They are indeed merest suggestions. The first was *Elders and Fyffes, Ltd.* v. *Hamburg Amerikanische Packetfahrt*,[9] where Bray J. was faced with the argument that the *Daimler* principles operated to transform a company incorporated in England into an American company by reason of the controlling interest in its shares being held in America. He said:

> " Lord Parker only decided that by certain conduct an English company might become an enemy company. He did not say that it would thereby cease to be an English company." [10]

Two remarks may be made. First, the *situs* of the controlling interest should not necessarily be decisive in determining where the company's centre of control is situate for it is no more than a relevant factor [11] and on the facts of the *Elders and Fyffes* case the centre of control appears in any event to have been in England. Secondly, Bray J.'s remark is surely a truism: by residing in enemy territory (or indeed anywhere else) I do not necessarily cease to be " English "; indeed if I engage in certain activities I may face a capital charge just because my nationality has adhered. There seems to be no reason in propounding a different rule for corporations.

The second authority cited by McNair J. was *The Unitas*,[12] a prize case where Lord Merriman held that a ship flying the German flag was condemnable despite the owner being a company in which the controlling interest was held by an allied company. Again this is of only the slightest assistance for the honoured rule of International Law,[13] now accepted into English municipal law,[14] is that for purposes of prize law a ship's character is determined

[8] Admittedly they are, but the writer sees no reason to doubt the universality of the principles therein established. In the context of trading with the enemy it is fashionable to speak of " commercial domicile," but this is determined by the same rules as determine " enemy character " (are the two concepts not the same?) and in the writer's submission the latter is an inquiry simply as to where the *propositus* is resident.

[9] (1917) 34 T.L.R. 4; (1918) 34 T.L.R. 275 (C.A.).

[10] (1917) 34 T.L.R. at p. 4.

[11] *Cf. Gramophone Co., etc.* v. *Stanley* [1908] 2 K.B. 89 (C.A.) (a case on the Finance Acts); Farnsworth, *op. cit*, p. 134.

[12] [1948] P. 205.

[13] Oppenheim, *International Law*, 7th ed., Vol. 2, pp. 277–8.

[14] *The Marie Celeste* [1914] P. 218.

by the flag which she wears and a shipowner, whatever his own characteristics, must accept the consequences of that dress.[14]

With respect it seems perfectly correct to hold that the second defendant was an "English" company—*i.e*, a British national domiciled in England—and that the acquisition of enemy character did not destroy either of those characteristics. It was an added "taint" [15] which might have involved unpleasant consequences for those resident in this country who tried to do business with it, but in the writer's respectful submission McNair J.'s holding in no way answers the question for decision which has been formulated above. It is suggested that the residence of the second defendant should have been all-important. That a person is "English" should not render any agreement which he enters into whilst resident in enemy territory with an enemy person invalid, for as the standard authority points out,[16] neither of the justifications for holding a contract to be a trading with the enemy (communication across the line of war and benefit to enemy resources) is applicable. The same consideration should logically apply to contracts entered into before the outbreak of hostilities,[17] as were the agency contracts in this case. It is possible that the nature of the conduct contemplated by the contract may be such that no English court would enforce a right claimed thereunder, *e.g.*, a contract to broadcast for the enemy,[18] but such invalidity depends on the individual contract and not *merely* on one of the contracting parties being "English."

Michael Mann.

More Public Mischief

Though the judgment of the Privy Council in *Joshua* v. *The Queen* [1955] 2 W.L.R. 8; [1955] 1 All E.R. 22, is a short one, the point in issue is of some significance in view of the decision only last year of *R.* v. *Newland and Others* [1954] 1 Q.B. 158. Since the Lord Chief Justice had intimated in *Newland* that as a matter of policy the public mischief cases should, despite *R.* v. *Manley* [1933] 1 K.B. 529, be regarded as part of the law of conspiracy, the view taken by the Judicial Committee in *Joshua*, in which the appellant had been convicted of effecting a public mischief whilst acting alone, promised to be of interest.

15 "Enemy character is not substituted for the original character, but is something added to it": *per* McNair J. [1955] 2 W.L.R. at p. 91.

16 McNair, *The Legal Effects of War*, 3rd ed., p. 116.

17 In *Re Badische* [1921] 2 Ch. 331, despite the enemy residence of the English company the contract clearly involved communication across the line of war.

18 McNair, *op. cit.*, p. 116. This provides the consequence to the illustration in the passage from McNair J.'s judgment quoted above of the second defendant contracting to supply coal to a German armament firm.

The accused had been charged with sedition and with effecting a public mischief contrary to the common law by agitating sections of the public in the Windward Islands against the local police. The trial judge having directed the jury that, if they found that the accused uttered the words complained of, he was guilty of effecting a public mischief, Joshua was convicted on this charge but acquitted on that of sedition in respect of the same speech. It was held by the Privy Council that the direction on public mischief was bad in that the judge had usurped the proper function of the jury: he should have directed them on the elements of the crime (*assuming that such a crime existed*) and on the facts. It was for the jury alone to find whether on those facts the accused was guilty. Furthermore it was undesirable that a person should be charged with sedition and public mischief in respect of the same speech when the only mischief effected by the speech was due to its allegedly seditious character.

The decision, therefore, though not binding, is of some assistance on the sedition point and in resolving the respective functions of judge and jury, assuming that the crime of public mischief does exist, though it provides no indication of the Committee's own views as to whether Lord Goddard's lead in *Newland* should be followed. This is perhaps hardly surprising since Lord Goddard had himself conceded, somewhat over-readily in view of *R.* v. *Taylor* [1950] 2 K.B. 368, that *Manley* was still binding, and the Privy Council was not unnaturally reluctant to determine a question on which there had been until 1954 such a sharp division of opinion. The value of the actual *ratio decidendi* is apparent when it is remembered that the direction of the trial judge had been fully in accord with that in most of the public mischief cases and that as recently as 1944 it was stated by the Court of Criminal Appeal in *R.* v. *Young* (1944) 30 Cr.App.R. 57 that it was for the judge "to say whether certain facts amount to a public mischief and for the jury to find whether the facts existed or not."

S. Prevezer.

Maintenance and Common Interest

The decision of the Court of Appeal in *Martell* v. *Consett Iron Co., Ltd.* [1955] 2 W.L.R. 463; [1955] 1 All E.R. 481, has thrown some light on several obscure points in regard to what Lord Dunedin once called "a cumbersome curiosity of English law," namely the tort (and crime) of maintenance.

The plaintiffs in the action were, respectively, a riparian owner, and the trustees of an angling club with a fishing tenancy on the River Derwent, and they claimed an injunction and damages for pollution of the river. The allegation of maintenance arose from two deeds of indemnity whereby the Anglers' Co-operative Association Trustee Co. (agreed by all parties to be a mere instrument

of the Anglers' Co-operative Association) undertook to indemnify the plaintiffs in respect of the costs of the action. The Anglers' Co-operative Association was an association for the protection of the rights of owners and occupiers of fisheries, and for the prevention of the pollution of rivers, but its membership was open to, and subscriptions were invited from, the public at large. The defendants accordingly sought a stay of proceedings on the ground that the action was being illegally maintained.

The main issue in the case was whether the Anglers' Co-operative Association and its subsidiary had a sufficient common interest with the plaintiffs to justify them in maintaining the action, but a number of other points also required discussion. Firstly, it was clear that the defendants not yet having suffered any special damage could not claim that a tort had been committed against them.[1] However, it sufficed for their purpose if the crime of maintenance had been committed and special damage was not necessary here.[1a] In the second place, it was argued that the plaintiffs could bring themselves within one of the specific defences by showing that they were being supported out of charity. In the event it was not necessary to decide the point but some differing opinions were expressed by the members of the court. Vaisey J. (agreeing with Danckwerts J. at first instance [2]) thought the plaintiffs came within the exception, but Hodson L.J. took the opposite view and Jenkins L.J. inclined the same way. All three members of the court agreed, however, that this defence presupposes a charitable object in its technical meaning.

The third subsidiary point which again did not require a decision, was whether a stay of proceedings was in any event an appropriate form of relief. The court clearly thought that it was not, partly because to grant a stay would be inconsistent with the rule that maintenance is not a defence to the maintained action,[3] and partly because in such proceedings the accused maintainer would not have an opportunity to defend himself from a charge of a criminal offence.

On the main issue in the case the court, after steering its way through a considerable number of authorities, was, happily, able to hold that the Anglers' Co-operative Association did have a sufficient common interest with the plaintiffs to justify the maintenance. Two earlier decisions of the court, however, required careful examination before this conclusion was possible. These were *Alabaster* v. *Harness* [4] and *Oram* v. *Hutt* [5] in both of which

[1] *Neville* v. *London Express, Ltd.* [1919] A.C. 368.
[1a] Or so it is usually assumed. But Hodson L.J. (at p. 496) was not satisfied of this.
[2] [1954] 3 W.L.R. 648.
[3] *Skelton* v. *Baxter* [1916] 1 K.B. 321.
[4] [1895] 1 Q.B. 339.
[5] [1914] 1 Ch. 98.

it appeared to have been laid down, in effect, that for this purpose "A common interest means an interest recognized by law in the subject-matter of the action or some issue between the parties to the action."[6] The court was, however, able to distinguish these cases on the ground that they were both actions for defamation, *i.e.*, actions of an essentially personal nature in which only the person defamed and anybody with a common interest as thus strictly defined, could be regarded as having enough interest to justify maintenance. This point had already been made by Buckley L.J. in *British Cash & Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.*[7] in distinguishing *Alabaster* v. *Harness*. In the former case the Court of Appeal held that it was not illegal maintenance for a company to secure customers at the expense of a rival company, by promising to indemnify the customers for any damages and costs which they might be condemned to pay to the rival in respect of breaches of contract. Without defining what constituted a common interest in all cases, the court here held that the defendants had a business or commercial interest in the maintained action and that this was sufficient.[7a] The same view also appears in the earlier case of *Plating Co.* v. *Farquharson*.[8]

In the present case, however, the court has thrown the doors open much wider and Jenkins L.J. was prepared to hold that anyone with a genuine business interest, however remote, or, apparently even a social or recreational interest, would have a common interest for this purpose. He gives these examples of such interests with reference to the case in hand: a vendor of fishing tackle, a hotel proprietor depending for his custom on people fishing in a nearby river, a person accustomed to fish in a particular river by permission of the riparian owner, whether or not given for consideration. He concluded that, in his view, "the range of relevant interests is potentially of great width."

Even this wide view of the nature of a common interest was not decisive as there were members of the Anglers' Co-operative Association who had not even an interest as thus defined in the litigation. The court held, however, that the real question was whether the Anglers' Co-operative Association could fairly be described as being in substance a body of persons individually possessed of an interest in the issue as thus defined and no evidence having been given on this point, the charge of maintenance failed.

It is fortunate, to say the least, that the court was able to come to this conclusion, so manifestly in accordance with justice and common sense. As Danckwerts J. said when the case was before

[6] *Per* Lord Parker in *Oram* v. *Hutt* [1914] 1 Ch. at 104.
[7] [1908] 1 K.B. 1006.
[7a] *Cf.* the way in which this has also been held a defence to blackmail (*Thorne* v. *Motor Trade Assocn.* [1937] A.C. 797) and to conspiracy (*Crofter Hand Woven Harris Tweed Co.* v. *Veitch* [1942] A.C. 435).
[8] (1881) 17 Ch.D. 49.

him [9]: "A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression." It would, moreover, be paradoxical if the law were to forbid people to band together in order to finance litigation in protection of common interests of this kind, while, at the same time the State is prepared to foot a share of the bill if any of the litigants are poor enough. If this were the law the taxpayer, as well as the angler, would have a legitimate grievance. P. S. Atiyah.

Safe System of Work on a Farm

In *Rands* v. *McNeil* [1955] 1 Q.B. 253, the Court of Appeal had to consider the liability of a farmer for the injuries done to one of his labourers by a dangerous bull kept on the farm. The bull in question was known to be dangerous and so was kept permanently in a loose box which from time to time had to be cleaned. The system adopted to do this was to extend a staff with a hook on it through the window or half-door of the box and pass the hook through the ring on the bull's nose. A rope was then passed through the ring and made secure to some firm object outside the box, thus allowing the box to be cleaned out in safety. On the day in question, the stockman, Moss, wanting to clean out the box, tried to hook the bull's ring from the window, but the bull backed away and he was unable to do so. He then decided to go into the box and try to hook the bull there and asked the plaintiff, Rands, who was senior labourer on the farm, to assist him by standing at the open door in case he had to make a dash for safety. After some while, during which Moss tried but failed to hook the bull from inside the box, Rands volunteered to try and the men changed places. Rands had made several attempts when the bull suddenly charged and seriously injured him. All the men on the farm knew that the bull was dangerous and Moss, who ordinarily attended to the animal, had been instructed by the farmer to secure it from the window or half-door by means of the hooked staff before cleaning the box, but neither he nor the plaintiff, Rands, had been expressly instructed never to enter the box in any circumstances while the bull was unsecured. The plaintiff claimed damages from the farmer, alleging negligence in failing to keep the bull under control and in failing to provide safe appliances and a safe system of work, and also breach of his strict duty to keep under control an animal known by him to be dangerous.

The Court of Appeal affirmed Donovan J.'s judgment dismissing the plaintiff's action. The court unanimously held that the strict *scienter* rule of liability for damage done by dangerous animals

[9] [1954] 3 W.L.R. 648 at 661.

did not apply to the plaintiff's claim. The narrow ground on which this conclusion was based was that, the bull never having escaped from its place of confinement, an essential condition of *scienter* liability was not satisfied. If by "escape" is meant escape from control, this view is unexceptionable, but Denning L.J. went so far as to equate the *scienter* rule with the rule in *Rylands* v. *Fletcher* in respect of the condition of an escape, which would deny the application of the *scienter* rule to any case where the plaintiff is attacked by an animal on the defendant's land. This is inconsistent with a long line of cases, which can hardly be taken to have been impliedly overruled by the decision of the House of Lords in *Read* v. *Lyons* [1947] A.C. 156. Even if "escape" is construed in the narrower sense of escape from control, there appears to be no case, apart from *Rands* v. *McNeil*, in which the *scienter* rule has been held inapplicable on the ground merely that there was no escape from control. In *Besozzi* v. *Harris* (1858) 1 F. & F. 92, the plaintiff was mauled by a bear which the defendant kept on a chain in his garden and the defendant was held liable to her under the *scienter* rule. The foolhardy plaintiff who interferes with dangerous animals has been sufficiently met in the past by a plea of *volenti non fit injuria*, contributory negligence (*cf. Marlor* v. *Ball* (1900) 16 T.L.R. 239), or that he was a trespasser.

On the broader question whether the *scienter* rule could ever apply to a claim by a farm worker against his employer for injuries inflicted by a dangerous animal kept on a farm, Denning L.J. thought that a farmer's duty towards his men was no higher than that of any other employer. "He must take reasonable care not to subject his men to unnecessary risk. The only difference is that when he has a dangerous bull he must take very great precautions" (at p. 257). Jenkins L.J. thought that "it would be contrary to common sense to hold that the keeping by a farmer of a bad-tempered bull constitutes in itself negligence on his part so as to make him liable to his men for any injury they may sustain in the course of their dealings with the animal, unless indeed the bull has proved itself to be so utterly ferocious and unmanageable that the farmer knows or ought to know that the only way to prevent it injuring the men is to get rid of it" (at p. 267). Morris L.J. did not go into the question beyond observing that "it may well be that if someone is employed as the custodian of a bull with dangerous propensities he voluntarily accepts such risks as are involved in such employment" (at p. 272).

It is remarkable that there should have been no direct authority on this question, though the view expressed by the Court of Appeal is implied in such decisions as *Mansfield* v. *Baddeley* (1876) 34 L.T. 696, *Yarmouth* v. *France* (1887) 19 Q.B.D. 647, and *Bowater* v. *Rowley Regis B. C.* [1944] K.B. 476. In *Bowater's* case both Scott and Goddard L.JJ. instanced the case of a horse-breaker as a proper one to apply the maxim *volenti non fit injuria*, and in

Mansfield v. *Baddeley* a Divisional Court held that the plaintiff, who had been bitten by a savage dog kept by her mistress, was entitled to recover because, the dog being kept on a part of the premises to which she did not ordinarily resort but to which she had been sent by her mistress on the occasion she was bitten, the risk of being bitten by the dog was not incidental to her employment. *Mansfield* v. *Baddeley* suggests that the *volens* maxim can be pleaded only against a servant whose ordinary duties expose him to the risk of injury from a dangerous animal kept by his master, and this view is supported by dicta of Jenkins and Morris L.JJ. in *Rands* v. *McNeil*. Denning L.J., however, appears to have thought that the strict rule of liability would not apply at all as between a farmer and his men. The difficulty with this view is that, if the risk is not incidental to a particular servant's employment, true consent to the risk can hardly be shown.

A majority of the court (Jenkins and Morris L.JJ.) held that Rand's claim in negligence failed also. Since there was no allegation that the defendant was vicariously liable to the plaintiff for the negligence of Moss, whom the trial judge had described as in charge of the operation, his liability in negligence turned on whether the system followed, on his instructions, in hooking the bull was a reasonably safe one, and on whether, even if the system was at fault, it could be said that the system was a cause of the plaintiff's injuries. Though the majority, together with Denning L.J., disapproved of Donovan J.'s opinion that the plaintiff's action must necessarily fail if, in entering the box, he was acting outside the scope of his employment, nevertheless they both thought that, on the trial judge's findings, the plaintiff could not succeed. Jenkins L.J., though he thought it questionable whether the method adopted was not so slow and uncertain that the defendant ought to have foreseen that his men, eager to get on with their work, might go into the box in order to catch the bull, was not prepared to overrule Donovan J.'s finding that the method was adequate. He pointed out that there was no urgency about cleaning the box at any particular time. Morris L.J., on the other hand, based his rejection of the plaintiff's claim on the trial judge's finding that Rands' "own lack of reasonable care for himself was the sole cause of this distressing mishap." Both accepted that Rands was acting within the scope of his employment in complying with Moss's request to help him with the bull, though he had not assisted before.

Denning L.J., in dissenting on this head of the plaintiff's claim, gave three reasons for thinking the system defective, *viz.*, (1) neither Moss nor Rands, though they knew the bull to be dangerous, had ever been expressly instructed not to go into the box in any circumstances while the bull was unsecured; (2) there should, he thought, have been a chain attached to the bull's ring so that the men could angle for the end of the chain instead of poking at the

bull's nose; and (3) because "good sturdy men," having failed to secure the bull from the window, would naturally go into the box and try to secure the bull there rather than put off the job. Rands having been at fault in entering the box was, he thought, if the defendant's system was also at fault, a ground for reducing his damages rather than defeating him entirely. With respect to the majority, Denning L.J.'s view of this aspect of the case would seem to be more in accord with recent decisions, such as *General Cleaning Contractors* v. *Christmas* [1953] A.C. 180 and *Drummond* v. *British Building Cleaners* [1954] 1 W.L.R. 1434, on the liability of employers for failing to instruct men in dangerous employment in safe methods of work.

Douglas Payne.

Death and Moral Obligations

There seems little doubt that the decision of Harman J. in *Re Makein, decd.*[1] is legally unimpeachable if not quite inevitable. He there held that an illegitimate son is not a dependant within the meaning of the Inheritance (Family Provision) Act, 1938, s. 1 (1) (as amended by the Intestates' Estates Act, 1952), so as to be entitled to maintenance on the intestacy of his putative father. It is probably fair to impute to the Parliament of 1938 a knowledge of the well-established rule of statutory interpretation according to which the word "child" in a statute means legitimate child, unless a contrary intention appears. Indeed it seems probable that if Parliament had intended, either in 1938 or in 1952, to make provision on intestacy for illegitimate dependent children, it might have done so by express words. The decision really means that what Parliament failed to do in 1938 or 1952, a judge of the Chancery Division has refused to do in 1955, with the result that the surviving spouse and two legitimate children of this particular intestate were held entitled to divide between them an inheritance of £16,000 and refuse to maintain from it during his infancy an illegitimate child acknowledged as such by the intestate and brought up as a member of his family.[2]

Some reflections are nevertheless prompted by the changes which have occurred in the public attitude towards devolution of property at death free of the shackles that bound it while its owner lived, on the one hand; by the rigidity of *stare decisis* in statutory interpretation on the other hand, and by the impact of the one on the other.

[1] [1955] 2 W.L.R. 43; [1955] 1 All E.R. 57.

[2] The ruling was given on a preliminary point, assuming that the plaintiff could prove one or more of the following: (1) that he was a natural son of the intestate; (2) that he was acknowledged as such in the intestate's lifetime; and (3) that he was treated as a member of the intestate's family.

A considerable number of authorities had been cited in argument, and Harman J. considered them in turn, starting with the dictum of Lord Eldon in *Wilkinson* v. *Adam* [3]: "The rule cannot be stated too broadly, that the description, 'child, son, issue' every word of that species, must be taken prima facie to mean legitimate child, son or issue." Two comments may perhaps be ventured:—

(1) The statement was *obiter*, representing a wide statement of a general principle which Lord Eldon held to be displaced on the facts of the particular case, the *ratio decidendi* of which was probably most nearly expressed in a preceding passage [4]: "if illegitimate children are meant, there is no Rule of Policy which prevents the court from saying that they are intended; in other words, if they are sufficiently described, there is no rule that prevents their taking."

(2) This principle laid down nearly 150 years ago was probably then in advance of general public opinion. Not for another thirty years was an unmarried mother to be able to obtain a maintenance order from the putative father of her child.[5] Not until 1874 was it decided [6] that it was not contrary to public policy for a man to make, by a trust *inter vivos*, provision exceeding mere maintenance for his illegitimate children already born or begotten.

Harman J. indeed agreed [7] that in the construction of statutes "it is possible to trace, over the last century and a half, some relaxation in the strictness of proof required" that the word "children" is apt to include illegitimate children, but he rejected the view that any illegitimate child could claim to share in the deceased's estate as a dependant, adding [7]: "On this view, it seems to me that a person who was by repute, though not in law, the widow of the deceased might, by parity of reasoning, have a claim under the Act, and that even though there were a lawful widow." [8]

Further consideration was, however, given to the narrower class of illegitimate children acknowledged as such or brought up together with or in place of legitimate offspring, but Harman J. decided that they also were not within the statute, on the grounds that "every

[3] (1813) 1 V. & B. 422, 462.

[4] *Ibid.*, p. 447.

[5] By the Poor Law Act, 1844, fixing the maximum award at 2s. 6d. per week. This was increased to 5s. in 1872 and leaped to £1 in 1923. By the Affiliation Orders Act, 1952, the amount was increased to 30s. per week, the maximum amount recoverable in respect of legitimate children on a maintenance order in the magistrates' courts.

[6] *Occlestone* v. *Fullalove* (1874) 9 Ch.App. 147.

[7] [1955] 2 W.L.R. 48.

[8] The recent decision of the Court of Appeal in *Shaw* v. *Shaw* [1954] 2 Q.B. 429 may have rendered unnecessary a decision on this point, at least where the reputed widow is the innocent victim of a bigamous marriage, by giving her a claim for damages against the deceased's estate which supplements the rather pointless penalties for bigamy by some compensation for one of the victims of the fraud. Unfortunately this relief does not seem apt for extension to the children of such a bigamous marriage.

word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another" and that "'family' prima facie means 'children,' and 'children' prima facie means 'legitimate children' (so that) 'family' means 'legitimate family' unless the context indicates the contrary." Considerations of a more technical and perhaps less disputable nature were (1) that where another statute made provision for the families of deceased persons,[9] the courts held that the words did not include illegitimate children, and Parliament was obliged to pass another statute to include them [10]; and (2) that where Parliament has intended to give a right to the illegitimate children it has done so in express terms.[11]

Precedents on the other side were not, however, entirely lacking. In 1931 Mackinnon J. decided [12] that the provision in the Industrial Insurance Act, 1923, for insurance against funeral expenses of children included such expenses for illegitimate children because "the incidence of those expenses cannot depend upon whether before the birth of the particular child the mother did or did not go through a ceremony in a church or registry office. The nature of the duty or obligation as to which she is desirous of insuring is precisely the same whether the child happens to be legitimate or illegitimate." This was a bold as well as a just decision, and it was surely open to a later judge to follow it and hold that an illegitimate child's need of maintenance when alive is no less real than his need of burial when dead. Harman J., however, preferred not to follow this "high-water mark for an interpretation of this kind."

The progression from the unspoken assumption to the foregone conclusion might, indeed, be thought fairly clearly traceable in the earlier and latter parts of Harman J.'s judgment. Thus he refers to the admitted fact that the law of intestacy makes no provision for a natural child to succeed to any part of the estate of his putative father. It might seem that this is an argument for, not against, the inclusion of such a child under the Inheritance (Family Provision) Act, 1938, as in extending the operation of this Act to intestates' estates it can hardly have been intended to limit its operation to those who would have succeeded on intestacy without it. And again, towards the end of his judgment, Harman J. points out: "The Act of 1938 was the first statutory interference in England with the freedom of testamentary disposition. Before 1938 a man might by his will disinherit his whole family, whatever sense be given to that word. At first sight, it seems to me that an Act intended to cut down this freedom should not have a meaning given to the class of persons who may take advantage of it more extensively than its plain meaning warrants, because every person

[9] The Fatal Accidents Act, 1846.
[10] The Law Reform (Miscellaneous Provisions) Act, 1934.
[11] The Workmen's Compensation Act, 1925, s. 4.
[12] *Morris* v. *Britannic Assurance Co., Ltd.* [1931] 2 K.B. 125.

included among the dependants is a person having a right to question the testator's freedom to dispose of his own." This speaks volumes for the attitude of the judges in interpreting an Act of Parliament. If Parliament wishes to circumscribe " the right of a man to do as he likes with his own " (not during his life, but at the very moment of death) it must do so explicitly, otherwise the " plain meaning " of the words will be applied.

The rise of the doctrine that, at his death, a man might disinherit the children whom he was obliged to maintain during his life, has not been traced in detail, but it seems to have been associated with the decline of the power of the Church courts during the sixteenth century. The Courts Christian, who held it a sin for a man to die without making his last confession, with provision for his soul and the Church, certainly accepted no doctrine of freedom of testation, and seem to have provided in all cases for a defined share of the estate to devolve upon the widow and the children.[13] As against his wife, the husband's freedom to disinherit was in fact introduced by statute during the nineteenth century,[14] and lasted for just over a hundred years.[15]

Finally, Harman J. concluded that the legislature cannot have contemplated applications by illegitimate offspring competing with the claims of the legitimate dependants, since that " would indeed be visiting the sins of the fathers upon the children." There is certainly considerable judicial authority for concentrating the sins of the fathers at death as far as possible upon those children against whom they have sinned during life.

O. M. Stone.

Mortgages of Leaseholds by Way of Legal Charge: Relief from Forfeiture

One method of mortgaging a term of years absolute is by charge by deed expressed to be by way of legal mortgage (Law of Property Act, 1925, s. 86 (1)). The problem in *Grand Junction Co., Ltd.* v. *Bates* [1954] 2 Q.B. 160; [1954] 3 W.L.R. 45; [1954] 2 All E.R. 385, was whether a mortgagee by legal charge could obtain relief when the landlord enforced forfeiture of the term of years. In that case, the mortgagor (in fact, an assignee of the original lessee) did not seek relief. Under section 146 of the Law of Property Act, an underlessee may seek relief, and under section 87 (1) (*b*) a mortgagee by legal charge " shall have the same protection, powers and remedies . . . as if . . . a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour

[13] Pollock and Maitland, *History of English Law*, Vol. II, pp. 312 *et seq.*; Plucknett, *Concise History of the Common Law* (4th ed.), pp. 705–7.

[14] By the Dower Act, 1833, which rendered defeasible the widow's right to dower.

[15] Until the Inheritance (Family Provision) Act, 1938.

of the mortgagee." Upjohn J. held, without prejudice to any rights the mortgagor might have, that the mortgagee (in fact, the original lessee) was entitled to relief. This was an elaboration of dicta by Harman J. in *Re Good's Lease* [1954] 1 W.L.R. 309; [1954] 1 All E.R. 275.

In *Chelsea Estates Investment Trust Co., Ltd.* v. *Marche* [1955] 2 W.L.R. 139; [1955] 1 All E.R. 195, Upjohn J. had before him the question of what the rights of the mortgagor were in such a case. The landlords granted a 58 years' lease of premises to be used as a hotel. The lessee assigned to the plaintiff company, and on the same day the company mortgaged by legal charge to the original lessee (the defendant Marche). The company paid neither rent nor mortgage interest, the landlords got an order for possession, and no relief (in the events which happened) was granted to the company. The mortgagee then applied for relief, and an order was made that the premises vest in the applicant for all the residue of the original term. The mortgagee went into possession, and subsequently contracted as absolute owner to sell the premises. The mortgagors thereupon brought an action for redemption, contending that the defendant was still a mortgagee and not the absolute owner.

Upjohn J. first decided that the words of section 146 (4) of the Law of Property Act made it clear that the mortgagee had a new lease, and not an assignment of the original lease. He then applied what is known in Ireland as the doctrine of graft, and held that the new lease was added to the mortgage security and not held by the mortgagee as absolute owner. This was based on the fact that it was by virtue of his position as mortgagee that the defendant was able to obtain this new lease. The result appears to be the only case in which, since 1925, there can be a mortgagor of a legal estate in land whose sole interest in the mortgaged property is an equity of redemption. As the mortgagors were not seeking to stop the sale, the practical result was that they were entitled to the balance of the purchase-money after the mortgagee had paid himself off.

The learned judge pointed out that there would be anomalies whether he decided that the new lease was engrafted on to the mortgage security or he decided that the mortgagee took it as absolute owner. In the latter case, he said, the mortgagee could keep his term and still sue the mortgagors for the debt on the personal obligation. One possible way out of that would be to treat the order under section 146 of the Law of Property Act as equivalent to foreclosure. Taking the former course, Upjohn J. suggested two anomalies. First, that the mortgagee would remain liable for the whole term on the covenants in the new lease, even if the mortgagors redeemed the day after its creation. Secondly, if the mortgagors redeemed, the landlords would once again be saddled with a tenant whom they had just ejected as being unsatisfactory.

But the right to redeem is equitable, and it would be possible to defeat such a redemption by application of the clean hands doctrine (a suggestion for which I am indebted to Professor Montrose). That would dispose of both anomalies, and leave the mortgagors with only a right to an account of proceeds of sale. If the clean hands doctrine does not apply, it would seem that a sure-fire way of avoiding forfeiture has been found: every lessee who proposes to default on his obligations to his landlord should first take the precaution of mortgaging his term.

Presumably Marche has now conveyed the premises to the purchasers under the contract. What have they got? A mortgagee exercising his statutory power of sale conveys an estate free from any right to redeem or reversion in the mortgagor. But this mortgagee purported to sell as absolute owner. Possibly he could pass only what he was absolute owner of: his mortgage security. If that is right, the purchasers simply become the mortgagees—*i.e.*, the mortgagors can still redeem.

Although the mortgagee was entitled on relief only to a term less by one day than that forfeited, the court created in him a term co-extensive with that of the mortgagor. The court can give more generous relief than the applicant is entitled to. Could they give a longer term than that originally mortgaged, or one with less onerous covenants?

L. A. Sheridan.

Possession under a Statutory Trust for Sale

The Court of Appeal has a great deal of litigation to get through, and it is well known how admirably it discharges its function of providing expeditious appeals in large numbers of cases. Even reserved judgments are usually delivered with remarkable speed, when one thinks how few free days their lordships have to simmer over the more difficult decisions. It is because of the high standard achieved by the court in the huge majority of cases that when a judgment seems to fall below the usual excellence, one is inclined to carp, if only to prove that one's fallibility is not unique.

In *Bull* v. *Bull* [1] land was purchased in 1949 with money contributed mainly by the son, and partially by his mother, and the conveyance taken in the name of the son. The trial judge found that the mother did not intend to benefit him, and so, the presumption of advancement being negatived, the son held the land on the statutory trusts for himself and his mother as tenants in common. Trouble started when the son married, and his wife failed to get on with her mother-in-law. The son threatened to evict his mother, who wanted to stay, or at least to get back the money she had contributed.

[1] [1955] 2 W.L.R. 78; [1955] 1 All E.R. 253.

The decision of the unanimous Court of Appeal, in a reserved judgment, was startling. Denning L.J., delivering it said, "the son is, of course, the legal owner of the house; but the mother and son are, I think, equitable tenants in common." He then stated the rights of the old tenants in common at law; to occupation, to an account against one alleged to be taking an unfair share of the benefit, and to an action for trespass in the case of a complete ouster; and continued, "Such being the rights of legal tenants in common, I think the rights of equitable owners in common are the same, save only for such differences as are necessarily consequent on the interests being equitable and not legal."

After this calm beginning, however, the judgment became highly unorthodox. The court held that until sale each beneficiary was entitled to the possession, use and enjoyment of the premises and neither could turn the other out. As the son was trustee, does this mean that the trustees can never eject the beneficiaries? For many purposes the *cestui que trust* has no right to the specific items held by the trustee.[2] Certainly, in *Parker* v. *Rosenberg*[3] it was held by the Court of Appeal that the sole tenant for life under a trust for sale was not a "person . . . who is or would be but for this [Rent Restriction] Act be entitled to possession of the dwelling-house" forming part of the trust property, and so, when she and the trustee joined in a claim for possession based on the hardship of the beneficiary they failed. If in construing a statute based on economic considerations, the court will not lift the veil of conversion[4] there seems to be far less reason why it should do so in a statute based on conveyancing machinery.

Here the son was the trustee and, as such, it is submitted that he could turn his mother out, though if he did so she could sue him for due administration of the trust, if he did not make the land profitable, and, in the circumstances, she could probably compel a sale. Or she could ask for an order, under the Law of Property Act, 1925, s. 30, giving her powers of leasing and management, including, presumably, possession. But as the son was the majority owner, such an order would probably not be made. But the court went much further than this in pointing out that the son could not sell with vacant possession, so long as his mother remained in occupation. This statement seems somewhat surprising when one thinks of the purpose of the 1925 property legislation, to make land more freely alienable, by adopting the overreaching device. Let us then examine the authority for the proposition.

First, Denning L.J. says that there is the practical difficulty that a sole trustee *cannot* sell, because he cannot give a good discharge for the price, and he cites the Trustee Act, 1925, s. 14. But this section

[2] See my paper in (1954) 32 Can.Bar Rev. 520 at pp. 530–534.
[3] [1947] K.B. 371. Also Halsbury, Vol. 27, p. 759.
[4] The doctrine does apply to statutory trusts for sale: *Re Kempthorne* [1930] 1 Ch. 268.

does not go so far, and even the Law of Property Act, s. 27, does not prevent the trustee from conveying a good title. Still the son might find difficulty in finding a purchaser without the appointment of a co-trustee to receive the proceeds. However, he could transfer title, and since it does not seem that the trust was apparent on the title, a purchaser might well think he was buying from an absolute owner, whose discharge would be sufficient. In any event, as Denning L.J. pointed out, the difficulty could be resolved by the appointment of a co-trustee by the son.

His lordship continued that " so long as the mother is there, they [the trustees] could not sell with vacant possession." For this proposition he cites first the Law of Property Act, s. 14, a section on which there have been no decisions, and whose meaning is considered by many to be obscure. It enacts that nothing in this part of this Act shall prejudicially affect the interest of any person in possession or actual occupation of land *to which he became entitled in right of such possession or occupation*. But the mother's right to possession or occupation was in right of her interest as equitable tenant in common, and resulted solely from that, and the discretion of the trustee in letting her in. Presumably the provision deals with the case of the squatter, whose interest arises only by reason of his possession, or the tenant at will, whose rights arise by virtue of the estate owner's will, and of his own possession. It seems a far cry to say that the rights of the beneficiary resulting from the purchase of the land arise " in right of such possession or occupation."

The next section cited by Denning L.J. is the Law of Property Act, s. 35. But it is submitted that on a simple reading of the somewhat involved section, it is not, as his lordship suggested, the trust for sale, but the proceeds that are subject to " such powers and provisions necessary to give effect to the rights of persons interested in the land."

If this is so, then the overreaching provision applies, and resort to section 30 becomes unnecessary, as the beneficiaries' consent is not required for a sale.

It is submitted then that, on appointing a co-trustee, the son could sell the house. Indeed the decision is most unfortunate, as, without an order of court under the Law of Property Act, s. 30, whenever co-owners come to deadlock, the trustees will be unable to take the simple way out, and sell over the head of a recalcitrant beneficiary, who, over a period, may have become so frustrated that he would willingly cut off his hand to spite his face.

Valentine Latham.

REVIEWS

THE PROVINCE OF JURISPRUDENCE DETERMINED, ETC. By JOHN AUSTIN. Introduction by H. L. A. Hart, Professor of Jurisprudence in the University of Oxford. [London: Weidenfeld and Nicholson. 1954. xxi and 396 pp. 12s. 6d.]

THE republication of Austin's *Province of Jurisprudence Determined* in this new series, which will present to the more general public a number of significant works in the history of thought and ideas, is a most welcome event. As Professor Hart remarks in his introduction, Austin's work has been criticised almost incessantly since its appearance yet "never since his death, has it been ignored." Indeed, some of the most significant contemporary works in the field of analytical jurisprudence, in particular the doctrines of Kelsen, Hohfeld, Somló, Kocourek, have served to underline the lasting significance of Austin's attempt to define the necessary concept of a science of law. At the same time, the struggle of our generation for an effective international order has underlined the significance of Austin's distinction between positive law and positive morality. As a standard of reference, Austin's work remains indispensable although it is sincerely to be hoped that the science and teaching of jurisprudence, in England and elsewhere, will never revert to the sterile illusion that the analysis of concepts is the entire domain of jurisprudence. Professor Hart—whose short introduction, partly biographical and partly analytical, unfortunately gives no more than a few critical comments on Austin's system, instead of a comprehensive contemporary appreciation—observes that "English jurisprudence has been and still is predominantly analytical in character," and that "other influences . . . have been secondary." The correctness of this assertion seems to depend very much on the scope we give to the science of jurisprudence. If we go by titles of books, then the Austinian tradition has, until well into this century, almost a monopoly of "jurisprudence" (Markby, Holland, Salmond, etc.). But if the areas that Austin or Kelsen—neither of them quite consistently—exclude from the province of jurisprudence, namely the study of the interrelation of law and ideas, law and social changes, public policy, etc., are regarded as a vital part of the study of jurisprudence, then surely the influence of such writers as Maine, Dicey, Bryce or Maitland, is at least equal if not greatly superior to the effective influence of the analytical jurists. Nor should we be unduly impressed by the countless repetitions of the well-worn platitude that judges are only concerned with the law as it is and not the law as it ought to be.

Perhaps the most interesting section in this most attractive edition is Austin's lecture on "The Uses of the Study of Jurisprudence," published after his main work. This was an introduction to the course of lectures which Austin gave at the University of London from 1828 to 1832. In this lecture he outlined the reasons for teaching jurisprudence and—a matter of particular interest to readers of this review—the reasons why there should be fully fledged law faculties at universities, and why London possessed particular qualifications for such a faculty (it took nearly a century for the realisation of this suggestion). One hundred and twenty-five years later, Austin's plea for the advantages which a law faculty would bring, such as "a juridical literature worthy of the English Bar," good legal treatises, or the advancement of law and legislation as sciences by a body of men "specially devoted to teaching them as sciences," is by no means out of date. Following similar pleas, made about the same time (*e.g.*, by the New York Attorney-General

Benjamin Butler in a pamphlet published in 1838, advocating the establishment of a law school at New York University), the Americans have been well ahead of the British in the establishment of such full and balanced law faculties. But it is perhaps at last recognised, in Britain and elsewhere, that the theoretical study of law and its foundations is not an alternative to its practical understanding but that the two go hand in hand. It is almost embarrassing to say that such an assertion can even now not be regarded as a triviality.

W. Friedmann.

Supreme Court and Supreme Law. Edited by Edmond Cahn. [Bloomington: Indiana University Press. 1954. ix and 250. $4.00.]

This little volume devoted to the Supreme Court of the United States is a most inspiring and thought-provoking work. It is not a mere listing of what that court is and what it has done. There is an assumption that these are known and, in the words of the editor, there is an effort to comprehend and evaluate an "institution." As the book is neither a defence nor an attack, we enjoy the inquiry into the origins of something which today in federations we rather take for granted—the place and the power of the highest court to pass upon the validity of legislation from a constitutional standpoint. While it is true that the "judicial power shall extend to all cases, in law and equity arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority" [Art. III, s. 2], the concept or even acceptance of this concept of judicial power in the constitutional extent to which it has been used in the United States, Canada and Australia was something new to a nation born into a heritage of parliamentary supremacy. In 1803 the court first, as a full court, exercised its power to declare unconstitutional an act of Congress. The occasion for this volume is the one hundred and fiftieth anniversary of the decision in *Marbury* v. *Madison* (1803) 1 Cranch 137, and the meetings held at the New York University School of Law in honour of that occasion.

Without so much as an explanation of the case itself, so well known to students of federal constitutional problems, the volume steps immediately into its task in seven chapters. Dr. Cahn, the editor, is responsible for an introductory "American Contribution" in which are considered the nature of a federal constitution and the problem of immutability, solved by the amendment process and, because the "broad, sweeping phrases of the text" needed to be "interpreted by some authoritative organ" (p. 12), by the method of judicial review by the court. There is a suggestion in later parts of the chapter (*e.g.*, pp. 13–16) that the decision in 1803 replaced an "appeal to heaven" by an appeal to the courts. Whatever may have been the earlier sanctions, if any, judicial review as exemplified in 1803 inaugurated a new and wonderful method of preventing the various forces in a State which is subject to a written constitution from, in effect, tearing up the charter. The editor properly notes, however, that judicial review as we know it in the United States, is more than just simple enforcement of the terms of a constitution; it is also an "express or tacit interpretation of the Constitution; or—in other words—a continual process of adjusting and adapting the fundamental fabric" (p. 19). How far this latter point may be true in Australia's or Canada's highest body is as yet questionable.

Chapters two and three consist of six papers given by the other five participants at the New York celebrations, together with the impromptu discussion which followed each paper. In discussing the conditions and scope of constitutional review, Dean Bischoff emphasises some features of review as developed in the United States—jurisdiction to declare a law unconstitutional

will not be exercised if at all possible; no references as we know them in Canada (must be actual litigation taken in good faith). The differences for Canada and Australia are noted by Dr. Paul Freund (p. 33). There is some suggestion in favour of an enlargement of these rules to permit the court to exercise its power more readily, but the nature of the remedy is not made clear (Bischoff, p. 31). A further limitation in which political issues are held to be "non-justiciable" is discussed by Professor John Frank. It would seem that some of these issues do not differ from some of the questions upon which we in the Commonwealth are content to accept the statement of the Secretary of State or other officer of the government. But in the United States considerable expansion of this exception is found, to the regret of some panel members (and see Frank's separate paper at p. 182). It is thus suggested that the point at which war begins or ends is a conventional political question for international purposes, "but there is no good reason why it must be similarly unreviewable for domestic purposes." Scope of review also covers the problem of what facts may be examined, and the "Brandeis brief" in which a large quantity of extrajudicial records (legislative committee reports, action of other legislatures, books, articles) are looked to. Perhaps the legal profession should in other countries make use more formally of this type of brief. Dr. Freund suggests considerable extension even within his own country. But the absence of such briefs should not mean that courts elsewhere do not examine these materials in forming their conclusions, perhaps not directly in each individual case but by way of the ordinary reading of which they are allowed to take judicial notice. We realise the unfortunate extent to which in the United States legislative committee and other records are padded with irrelevancies in an effort to direct, by use of these materials, the judicial interpretation of legislation. The Brandeis brief offers a similar scope for "manufactured" facts. Such briefs may direct the court's inquiry to these materials, but they should have, it is humbly suggested, no more weight than the things of which our judges take judicial notice. The third chapter in a similar way discusses the process of constitutional construction. Perhaps the thesis of this portion is summed up by Mr. Curtis of the Massachusetts Bar.

> "The court is well fitted to find the meaning of the Constitution where it belongs, in its words. This is a lawyer's usual and familiar vocation. It may be easier, but I won't agree that it is nobler, and I know it is not wiser, to chase the meaning of our Constitution through the basement door of our ancestors' intentions. The justices are at their best when they measure their respect for the opinions of their fellows and co-workers in our government against the meaning of the words, instead of against a reverence for the past" (p. 70).

In the discussion of Mr. Curtis's remarks, Dr. Freund refers to the approach of the Judicial Committee of the Privy Council in Canadian and Australian constitutional appeals—a search for the "pith and substance" of the particular law in question, a search which he criticises as one defining the law by its essence rather than, he suggests, by its consequences. The effect of the law must be examined, including the consideration of evidence, to find its consequences. Then only will it be possible to say whether a law is federally proper. This and other points of a comparative nature are enlarged upon in Freund's separate paper (Chap. IV). But do we not in Canada, to a large extent, do what Freund suggests? Do we not, in finding the "pith and substance," look to the consequences? Does factual evidence in the form of voluminous briefs help materially to solve the difficulty, remembering not only the difficulty of accepting at face value the contents of those briefs but also the opportunity which counsel in our countries has, in largely unlimited time, to develop some of these matters in oral argument, with such references to recorded materials as he desires? Perhaps our emphasis upon consequences rather than an assignment of the law to a "category" of the constitution should be more readily recognised. I admit a tendency in some cases of "pith

and substance" to forget consequences. But there is not, it is suggested, a real difference in approach in these countries.

The extent to which constitutional interpretation is said to depend upon today's notions of what specific language means is illustrated (in the extreme) by the suggestion that a law permitting whipping should be held unconstitutional today as a "cruel and unusual punishment" (prohibited by the constitution) because only two of the forty-eight states have such laws today. Presumably it would be constitutional in Canada today (had we a similar prohibition in our constitution) on the basis of the very same reasoning. This reasoning has not entirely been applied, it is thought, to the due process clause —a point raised by Freund at pp. 73–4, but not dealt with. Finally, in the last of the six papers, there is an excellent discussion of the role of *stare decisis* in its application to the highest court (pp. 76–85).

The book is completed with four major papers dealing with judicial review in relation to federalism (Freund), basic liberties (Frank), distribution of national powers (Hurst) and to majority rule (Curtis). Some of these discussions have been noted already where they arose in earlier debate. They are in some ways the meat of the book, and are a very fair assessment of the court's role. To other federations, particularly in Canada where we are just beginning to feel the need for guidance from the experience of others now that the Privy Council has gone, this volume offers in wonderful measure some of the accomplishments and pitfalls of constitutional review by the highest court in the State.

Gilbert D. Kennedy.

Some Were Spies. By Earl Jowitt. [London: Hodder and Stoughton. 1954. 223 pp. 16s. net.]

Public interest in the drama of the criminal courts remains insatiable. The sales of Agatha Christie and Dorothy Sayers rise ever higher: barristers who have never practised make incomes a silk might envy by resurrecting cases in which they have never taken part: while every playwright knows the one certain talisman for his play's success is the inclusion of a trial scene. Crime programmes top the list of B.B.C. popularity polls, and even children today prefer criminals to fairies. Lord Jowitt, a dignified and unlikely figure amidst this motley throng, has now joined in the scramble, and after a preliminary revelation in the columns of the *Evening Standard* has produced his whole creation for our delight. I confess that I read this little digest of famous cases with absorbed interest, and venture the unverifiable and therefore safe prophecy, that—were it not for the prohibitive price—this volume would be a best seller. The drawback of all such books—and they are now so numerous that like commercial histories they practically constitute a new literary "genre"—is that by concentrating on the high spots of a barrister's life, they disseminate and perpetuate the novelletish illusion that the barrister's profession is a glamorous one. For every interesting case there are a hundred dreary ones—bar aspirants you have been warned!

Lord Jowitt's first book *The Strange Case of Alger Hiss*, withdrawn in the United States, enjoyed a favourable press here, although there were critics who questioned the propriety of such a book's being written by an ex-Lord Chancellor, and cast doubts upon the relevance of his implicit conclusion, that had Hiss been tried in England he would have been acquitted. No such accusation of remoteness could here be justified since Lord Jowitt, either as prosecutor or defender, was personally involved in all the cases which he describes. In his potpourri every variety of villainy is sketched, from that found in big city firms as in the Royal Mail case, to that which sprang up literally amidst the cabbages in the delightfully named Cornish village of Piper's Pool. His first six cases, dealing with espionage, explain the title, but surprisingly enough they are the dullest in the book. Those

spies who landed on the English coast were apprehended almost before they could say "Adolf Hitler," let alone discover a secret document, and the chief impression they leave is of the extraordinary crudity of German Intelligence methods. None of the spies so hopefully dispatched could speak good English and one could not speak a word! As for Tyler Kent and Anna Wolkoff with their virulent anti-Semitism, their mania for collecting secret documents which they never used, and their passion for plastering urinals with insulting messages, they hardly deserve the name of spies at all.

The account of Princess Youssoupoff's libel action is intensely interesting, and her successful claim for £25,000 against a film company—who never knew of her existence—a pointer to the hazards of the then existing law of libel. As Lord Jowitt himself naively remarks: "How I wish some kind friend could identify me with the villain of a popular film." The author gives a horrific description of the murder of Rasputin, which although no novelty—full accounts appeared in Prince Youssoupoff's two books *Rasputin* (1927) and *Lost Splendour* (1953)—still enthrals. The wretched Rasputin, having gorged himself on chocolate cakes and wine containing enough prussic acid to wipe out a monastery, been shot three times, once through the heart, and bludgeoned with a loaded stick by the demented Prince Youssoupoff, eventually suffered death by drowning in the Neva, into which his supposedly dead body had been thrown. At the inquest his lungs were found full of water. For those with a taste for the gruesome there is further strong meat in the shape of Fox, the darling of the staff at Margate's Metropole Hotel, who, despite this distinction, turned out to be a male prostitute with long prison sentences for fraud and capped his career by murdering his mother. For the milder sort there remains Thorne, who dismembered the body of his fiancée who was suffering from "nerves" (justifiably it would seem), and buried her head in a tin in his chicken run. An interesting revelation occurs in the book which casts further light on the relations between Wilde and Carson. Carson told Lord Jowitt that they had met face to face in a Paris Street. "Did you stop and talk to him?" asked Jowitt. "Of course not" snapped Carson. One turns away from this picture of vindictiveness to the pleasanter memory of the Prince of Wales leaning out of his cabriolet in Cannes to salute Wilde, then in eclipse; or to Robert Ross standing three hours in the rain outside Reading gaol to raise his hat to the manacled Wilde as he was led away. Or one thinks of Lord Jowitt himself saving Lord Kylsant from expulsion from his club after conviction, and his kindly salutation of Hatry on a chance meeting after his release from gaol. This book reveals the author as a simple, kind, and curiously detached man. These last two incidents show that his eminence is not unmatched by his compassion.

Norman St. John-Stevas.

The Carriage of Goods by Sea Act, 1924. By Raoul P. Colinvaux. [London: Stevens & Sons, Ltd. 1954. xxv and 203 pp. (with index). 25s. net.] Payne's Carriage by Sea. Sixth edition. By J. Milnes Holden, ll.b., ph.d. [London: Butterworth & Co. (Publishers), Ltd. 1954. xxvi, 179 and 15 pp. 21s. net.]

Treatises on the Baltcon Charterparty. By Kjeld Rördam [London: George Allen & Unwin, Ltd. 1954. 196 pp. 32s. net.]

Mr. Colinvaux's new book is substantially an extracted version of those parts of Carver's well-known work on *Carriage of Goods by Sea* which are

concerned with the Act of 1924. It will no doubt be useful to practitioners to have these sections of Carver easily available in a small compass. In his excellent 9th edition of Carver (see my review in 16 M.L.R. p. 252) the author of this book expounded the 1924 Act in one section relying upon cross-references to other parts of the volume for the purpose of connecting it up with the general common law which of course remains operative in a number of connections. This made for a good deal of awkwardness and the chief value of the present volume lies in the fact that the relevant rules are brought together, so that the law in respect of a number of matters is now more easily ascertainable.

Mr. Colinvaux contributes an interesting, if slight, history of the difficulties and negotiations which led up to the passing of the Act. This might well have referred to the part played by the late Sir Norman Hill, the eminent Liverpool solicitor, and the shipowners of that port, in persuading British shipowners generally that they ought no longer to stand out against the movement for a standard bill of lading—I have always understood that this was of crucial importance. Nor does he refer to the influence of the banks who, with the growing use of documentary credits, were becoming more and more involved as holders of bills of lading, documents unreliable as security at that time owing to the prevalence of the "weight quantity and contents unknown" clause.

Mr. Colinvaux also includes a short general chapter on the bill of lading by way of introduction, and a number of appendices, which however are again, for the most part, taken straight out of Carver. Cases decided in the courts since the appearance of the 9th edition of that work are dealt with in footnotes.

It is interesting to observe that Mr. Colinvaux is extremely critical of the drafting of the Hague Rules. Comparing them with "a well-drafted enactment" like the Sale of Goods Act, 1893, which has had the effect of "crystallising" the law, he says that they "put it into confusion indefinitely," and again that "every month sees some new and insoluble problem arising" under them. He seems to attribute this to the fact that they "attempt to incorporate into English law the terms of an International Convention."

No prominent English commercial lawyer has given closer attention to the Hague Rules than he has and one therefore differs from him with a good deal of hesitation. I am, however, far from satisfied that the volume of litigation arising from the Hague Rules bears out this contention. The table of cases of this book is only some fourteen pages long, and certainly much less than half of the cases cited therein are concerned with the construction of the 1924 Act. The table of cases to Chalmers' *Sale of Goods Act, 1893*, runs to over forty-six pages, the great majority of which are relevant to the construction of that Act. Moreover, how few of the disputes over the meaning of the Hague Rules have been regarded as sufficiently important as to require the attention of the House of Lords!

I do not deny that the Rules have given rise to a number of very knotty problems, and there are of course others which have not yet been litigated. But it has always seemed to me that considering the 1924 Act is based upon the translation of a French text arrived at as a result of a series of international conferences which were concerned to formulate a large number of new rules the result was a remarkably successful achievement. I remember very well the gloomy prognostication of the Commercial bar at the time of the passing of the Act—they ought to have been pleased at the prospect of so much work. Yet by 1930 after five years working of the Act the reported cases as to its construction could just about be counted upon the fingers of both hands.

The drafting of the Sale of Goods Act, 1893, was a much simpler operation. It consisted merely in putting the effect of the decided cases into a code,

and it was carried through by a draftsman already experienced in the work. Yet no other codifying Act has given rise to so much litigation. Whether this can be accurately described as "crystallising" the law I wonder.

During the period which has elapsed since the present edition of Carver appeared there have been quite a number of cases relevant to the Act. Mr. Colinvaux has dealt with these in footnotes for the most part. This is often quite satisfactory, but on occasion leads to a certain clumsiness. In some cases indeed the footnotes are not concerned with new cases but give an extensive commentary on the text in Carver which it would surely have been better to have carried out by a complete rewriting, *e.g.*, the extensive footnotes to Art. III, r. 2, at pp. 46–47 which are rather confusing. Mr. Colinvaux has adopted the method of rewriting in connection with his acute criticism of Scrutton's commentary on Art. IV, r. 4, and the inconsistency of treatment is a little puzzling.

Payne's book on *Carriage by Sea* is of course an old friend. It was originally based upon the admirable lectures of the late Mr. J. G. Pease, for many years Reader to the Inns of Court, and is much the best student's textbook on the subject. It is a book which has been fortunate in its successive editors, each of whom has left a noteworthy impress upon it. The present edition for which Dr. J. Milnes Holden is responsible worthily upholds this fine tradition. Throughout its chapters the care and thoughtfulness of the new editor are evident, and he is to be congratulated on the sound scholarship displayed.

There have been few outstanding decisions on the law of carriage by sea of recent years, so that few changes of any substance have been required to the text. In Conflict of Laws, which is after all somewhat peripheral, the tendency to abandon the test of the ship's flag in the determining of the "proper law of the contract" has been accentuated and this is reflected in Dr. Holden's treatment of the subject.

He has however made two additions which are of some importance, and questionable wisdom. These are concerned with the "both-to-blame collision clause," and the "Jason clause" which are commonly found in contracts of affreightment concerned with shipments to and from the U.S.A. Although of much importance in practice they are highly technical and of limited range. I wonder whether to bring them into a book intended to give a student a general conspectus of the law of carriage by sea will not lead rather to the confusion of his mind than to its enlightenment.

Treatises on the Baltcon Charterparty, although largely technical in character, should be of interest to the student of comparative shipping law, and of value to lawyers, shipowners, and shippers who are concerned with trade to and from the Baltic. The Baltcon charterparty is used for the purposes of the coal export trade from this country to Baltic ports. It is an interesting and fairly early example (1908) of a standard form of contract agreed between representatives of the various interests concerned in this trade. It has stood the test of time, has had its use extended to cover other types of fuel, and has been taken as a model for the Polcon Charterparty which is now used for similar traffic from Polish ports.

Dr. Rördam's book which originally appeared in Danish consists substantially of a detailed analysis of the clauses of the charterparty made in the light of the decisions of the different Scandinavian courts which have been called upon to construe it, and more particularly of those of the Maritime and Commercial Court of Copenhagen and of the Danish High Court of Justice. Since many of the clauses in question are found in much the same language in other contracts of affreightment this analysis has a wider value than might at first appear. English law on the other hand is nowhere discussed which is a little surprising when the document under construction is an English document. However, it does not appear that the approach of the Northern courts is essentially different from that of our own, and it might

well be helpful to English judges from time to time to know how their opposite numbers in Copenhagen, Stockholm or elsewhere have handled some particular point of controversy.

The translation on the whole is in very reliable English, but from time to time statements which seem to be of rather dubious accuracy appear and one has the feeling that this is due to the translation. Thus on p. 11 it is stated that "the obligation of the charterer to pay the freight normally ceases when he has delivered a cargo" in which "delivered" presumably means "loaded." On the same page it is stated that "the charterer has no obligation in a legal sense to deliver cargo." To an English lawyer this is puzzling, since clause 1 of the Baltcon charterparty provides, as is of course usual in charterparties, that the charterer shall load a full and complete cargo and Mr. Rördam himself states lower down that his failure to do so will involve him in liability to pay damages. This, however, presumably flows from some difference in the legal concepts involved, and is not in any way due to the translation.

C.

THE PRINCIPLES OF COMPANY LAW. By HIS HONOUR JUDGE CHARLESWORTH, LL.D. Sixth edition. [London: Stevens & Sons, Ltd. 1954. xxxv and 380 and (index) 8 pp. 17s. 6d. net.]

His Honour Judge Charlesworth's book on *Company Law* has become well established and deservedly popular as an introduction for students of that subject. In this new edition of his book Judge Charlesworth does not profess to include all company law cases reported since the publication of his previous edition but only those which "seemed suitable to the scope of the book"; nevertheless his selection is comprehensive enough to include every case which could conceivably be of interest to a non-practitioner. The general impression obtained from a perusal of the book is one of excellence; indeed, the present reviewer endorses the opinion of Professor Gower, expressed in his review of the previous edition in (1949) 12 *Modern Law Review* 534, that this is the best of the students' shorter textbooks on Company Law. Judge Charlesworth may care, however, to bear in mind the following criticisms on relatively minor points.

In the preparation of this new edition Judge Charlesworth could advantageously have paid much more attention to the suggestions made by Professor Gower in the above-mentioned review. The treatment of *Newborne* v. *Sensolid etc., Ltd.* [1954] 1 Q.B. 45, could be improved. It is misleading to say of that case that "neither Leopold Newborne (London), Ltd., nor Leopold Newborne could enforce the contract," for the question at issue was one of validity not of enforceability; further, the reason should be given why, although Baxter was personally liable on the pre-incorporation contract in *Kelner* v. *Baxter* [1866] L.R. 2 C.P. 174, there was no contractual relationship between Leopold Newborne himself and Sensolid, Ltd. (Incidentally, with regard to *Kelner* v. *Baxter* itself, surely it is misleading to say on p. 42 that "no ratification of the contract could be made by the company without the consent of K," for there was no possibility of ratification at all.) In view of the space given on pp. 17 and 302 to *Re Jon Beauforte (London), Ltd.* [1953] 1 Ch. 131, the point should have been made that, even though the company needed coke for its legitimate business, the contract for the supply of the coke was *ultra vires*, because the suppliers knew it was to be used for a purpose which they must be deemed to have known was *ultra vires*. The wording of the passage on p. 263 relating to *Re Consolidated Goldfields of New Zealand, Ltd.* [1953] Ch. 689, is rather ambiguous, for it might be taken as meaning that the term "member" in the Companies Act, 1948, s. 212 (1) (*g*), does not include such past members as ceased to be members within the year immediately preceding the commencement of the winding up, and, in view of the reasoning in this

last case and in *Re Anglesea Colliery Co.* (1866) L.R. 1 Ch. 555, it is incorrect to say, on p. 248, that the term "contributory" in sections 212 and 213 of the Act includes only *certain* past members.

In addition to the incorporation of recent cases, Judge Charlesworth has introduced a number of other amendments and additions, *e.g.*, there is now a short discussion of no par value shares and the account of private companies has been slightly expanded. His alteration of the text relating to the liability of promoters for secret profits is not, however, satisfactory. Putting aside the doubts formerly expressed, Judge Charlesworth now states confidently and without qualification (at pp. 40–41) that, when rescission of the contract is not wanted by or is not open to it, the company can sue the promoters for damages for allowing the company to buy the property, and quotes in support passages taken out of their context from the speech of Lord Parker in *Jacobus Marler Estates, Ltd.* v. *Marler* (1913) 85 L.J.P.C. 167n. This question is only of real importance when the promoters acquired the property in question before the promotion began, for if they acquired it after the commencement of the promotion there is plenty of authority that repayment of the amount of the secret profit is an alternative remedy to rescission. Where, however, in *Re Cape Breton Co.* [1885] 29 Ch.D. 795, and in the *Marler* case itself acquisition by the promoters of the property (which had no readily ascertainable market value, *cf.* securities quoted on a stock exchange) preceded the commencement of the promotion, the Court of Appeal and the House of Lords respectively dismissed the company's claim for damages. Judge Charlesworth's failure to recognise the effect of these decisions is most surprising.

A new chapter on "Modern Trends in Company Law" has been added to enable Judge Charlesworth "to examine shortly the direction in which the practice of companies is moving and to offer some suggestions for the future development of the law." This new chapter does not seem a complete success. It commences with a comparison between companies and partnerships, which seems quite out of place there, and it is suggested that the comments therein on such topics as no par value shares, the *ultra vires* rule, private companies, and the status of preference shareholders would be brought home more forcibly to the student if they were in juxtaposition to the relevant rules of law set out elsewhere in the book.

J. A. HORNBY.

THE FEDERAL CONSTITUTION OF SWITZERLAND. By CHRISTOPHER HUGHES. [Oxford: At the Clarendon Press. 1954. 223 pp. 25s. net.]

MR. Hughes has written the fullest account of the Swiss Constitution that is available in English. His method is unusual for a British study of a foreign constitution: his book consists mainly of a translation of the Constitution and of two other laws of constitutional importance, with a commentary on each Article. He also gives the German text of the Constitution, and ends with a select bibliography in which his observations on the Swiss sources are singularly entertaining.

The best-known features of Swiss federalism—the extensive use made of the initiative and referendum, the elective federal Ministry with a fixed term, and the immunity of federal legislation from judicial review—are perhaps too intimately related to special conditions prevailing in Switzerland for general conclusions to be drawn from Swiss experience in these fields. There are other provisions of the Constitution—*e.g.*, the prohibition of Jewish ritual slaughter of animals and of the manufacture and sale of absinthe, and the direction to the civil authorities to see that every deceased person can be decently buried—which are still less likely to be imitated by constitution-mongers elsewhere. A writer on Swiss laws and institutions may therefore be justified in devoting his attention rather to their theoretical and historical foundations and to their practical operation than to comparison with other

systems. Mr. Hughes, who has a deep knowledge of Switzerland, strong individual opinions and a pretty wit, is admirably qualified to bring out the uniqueness and intrinsic interest of the Swiss system. Many of his readers, however, will feel that he would have written a better book if he had begun it with an introduction giving a general outline of the Constitution and its history. Even with the aid of two alphabetical analyses and a general index it is not at all easy to find one's way about the Constitution; and one can hardly hope to see the picture as a whole by notionally piecing together the fragments one discovers in comments on separate Articles. But it is hard to criticise one who can write in a commentary on the text of a Constitution that "there is nothing more certain than that men and women are in all their qualities unlike (though it cannot be said that one is undeniably superior to the other)"; that "Swiss wines are pleasant, but cannot compete on equal terms with the wines of France and Italy, and Swiss dessert grapes are smaller, dearer, and often sour"; or that "human nature is not equal to the task of sustainedly listening to Swiss speech-making."

S. A. de Smith.

THE VOCABULARY OF COMMONWEALTH RELATIONS. By S. A. de Smith, M.A., Reader in Public Law in the University of London. [The Athlone Press, University of London. 1954. 27 pp. Price 3s. 6d.]

This is an age of euphemism which has abolished classes, races and rat-catchers; people no longer die, they pass away or are called to higher service, and a bloody war is reduced to an emergency. The English might be allowed to do what they like with their own language, which is coming to be known as British English; but they have suffered others to tamper with the meaning of "India" and "Ireland." Have we yet been enough punished for the long period during which the Kings of England continued to call themselves Kings of France? Through the intricate evolution of the vocabulary of Commonwealth relations, Mr. de Smith acts as a most helpful guide. Here changes of terminology are not for the most part mere euphemisms. Some reflect changes in constitutional status, some express ideals, some displace terms that offend the *amour propre* of certain members of the Commonwealth; others offer a choice where no one term would be generally acceptable. "Empire," "Commonwealth" (first used in this context by Lord Rosebery as far back as 1884), "British," "Dominion" and "Colony" are dealt with in turn. The discussion shows that no convenient name has yet been found for the independent members of the Commonwealth as a group, with or without the United Kingdom. To the suggestions made here we may add that the British Nationality Act, 1948, refers, not very helpfully, to "the countries [*sic*] mentioned in subs. (3) of s. 1 of the Act," but these include Southern Rhodesia. There are also the provinces of Canada and the states of Australia, two groups each of which is *sui generis*, the latter remaining bound by the Colonial Laws Validity Act.

Mr. de Smith probably underestimates the growing sentiment in some colonies against the word "Colony," an attitude which is bound up with the substitution of "Colonialism" for "Imperialism" as the vogue word among Britain's critics. At a recent constitutional conference held in one of the colonies, the word "Colony" was scarcely mentioned once over a period of months: one talked about "this country" and "other similar territories." Another generic name lacking is one to embrace colonies, protectorates, protected States, and trust territories. Mr. de Smith refers to the newly named Crown Agents for Oversea Governments and Administrations and to Her Majesty's Oversea Civil Service; but he does not consider the expression "dependent territories" or "dependencies" which we find apt and convenient, although "dependency" without its context is ambiguous.

The section explaining the royal style and titles in the various countries of the Commonwealth, extracted from a previous article, is equally clear and illuminating.

This is the first of a series of Commonwealth Papers to be published by the Institute of Commonwealth Studies under the general editorship of Professor Sir Keith Hancock. The price is rather high for what is no longer than an article in a learned periodical; but it is understandable that the Institute, through the medium of the Athlone Press, should desire to publish its own occasional papers, most of which will originate in drafts discussed at seminars. We wish the venture every success.

O. Hood Phillips.

An Introduction to International Law. By J. G. Starke. Third edition. [London: Butterworth. 1954. xx and 485 pp., with 28 pp. index. 32s. 6d.]

The new edition of Starke's *Introduction to International Law* is a welcome addition to the introductory literature on international law. It is possible to refer it to readers as one of those books which, in the words of the author, "present an introduction to international law, not full or exhaustive, but containing the basic knowledge required by those who will have to deal with the subject in practice." Where students are concerned, however, there will still be need to supplement it by other introductory works, but it can easily be recommended to the veriest tyro as the first work he should look at to give him an idea of the subject, although one may question the value in an introductory work of a footnote such as "Pub. P.C.I.J. (1924), Series A. No. 2, at pp. 11–12" (p. 240, n. 2), when there is no reference to the name of the case concerned anywhere on the relevant page. Similar doubt may be cast on the value of the reference in the bibliography to Stone's *Legal Controls of International Conflicts* which "should be consulted on all questions concerning the settlement of international disputes, and concerning hostile relations (including war and neutrality)."

The most pleasing feature of the new edition is the expansion of the chapter on international institutions and that on war, armed conflicts, and breaches of the peace. In addition, Mr. Starke has paid full attention to developments that have taken place since the publication of the second edition in 1950, and there is reference to such matters as the Korean war, the recognition of Communist China, the *Anglo-Norwegian Case*, and the continental shelf. Similarly, the author has paid attention to recent literature, and Professor Medlicott's first volume on *The Economic Blockade* has been fully considered in connection with the law of economic warfare. In future editions, however, Mr. Starke might consider expanding what is now merely a "Note on Bibliography" into the more usual type of guide to further reading.

The reviewer has confined his criticisms to matters of a technical character intentionally. Starke's *Introduction to International Law* in its new edition is so useful as what its title describes that it is unfortunate that such small matters should detract from its general value.

L. C. Green.

International Military Tribunal for the Far East: Dissentient Judgment of Justice Pal. [Calcutta: Sanyal; London: Sweet & Maxwell. 1953. xxiii and 701 pp. £3 10s.]

The Tokyo War Crimes Tribunal was in more or less permanent session from June, 1946, until November, 1948, and its literary output was considerably greater than that of the far more important Tribunal which sat at Nuremberg. From the published accounts that have been made of this and similar war

crimes proceedings conducted in the Far East it would appear as if there is much ground for criticism of the methods that were adopted and even of the conduct of some of the judges (see, for example, Green, "Law and Administration in Present-Day Japan," 1 *Current Legal Problems*, 1948, p. 188, at p. 200, and Ireland, "Uncommon Law in Martial Tokyo," 4 *Year Book of World Affairs*, 1950, pp. 54–104), but unfortunately the full text of the proceedings is virtually unobtainable and H.M. Stationery Office has never seen fit to publish even the text of the judgment.

Now an Indian publishing house has made available the text of what is probably the longest dissenting judgment in history, that by Pal J., the Indian judge on the Tokyo Tribunal. The absence of a full text of the majority judgment makes it difficult to appraise the true worth of these 700 pages, but it is possible to compliment the learned judge, whether one agrees with his findings or not, on the care with which he prepared his judgment and the meticulous study he made of inter-war history and of non-Japanese comments upon Japanese conduct. He did not hesitate to point out that the United Nations (in the non-institutional sense of that term) were now seeking to indict Japanese leaders for actions which they had previously recognised or failed to condemn, and which "might be attributed in part to an anxiety (on the part of Japan) to imitate Western behaviour."

In his judgment Pal J. refused to make any concession to political opportunism. Thus he refused to accept as evidence of an aggressive intention against the Soviet Union anything that happened before the Japanese recognition of the Soviet Union: "Even if we are prepared to visit on sons their fathers' guilt, I do not think that we can in any way reach the present accused or judge their guilt by any reference to the acts or attitude of the Japanese government or the then 'small military group' who might have behaved in some particular way towards the Russia of 1904–05 or of 1918–22. The prosecution purported to give these acts as supplying the historic background. . . . If it is at all legitimate to refer to any historical background, I do not see why we should start with the years 1904–05 or 1918–22. . . . We may start with the date when the Empire of Japan, after more than two centuries of strict seclusion, entered, or, more correctly, was made to enter, again into relations with the outer world, under the terms of treaties obtained by the Western Powers from her by methods which, when later imitated by Japan in relation to her neighbours, were characterised by these very treaty powers as aggressive." The learned judge considered that all the evidence indicated a Japanese desire to remain at peace with the Soviet Union—an impression which the recently published Yalta documents show was shared by Stalin—while preparing for all eventualities: "The whole world suffered from the terror of Communism and Communistic developments and Japan only shared this feeling. Even today the world has not been able to free its mind of this terror, real or fancied. The whole world was preparing, and is, even now, preparing against the apprehended aggression of Communism and of the Communist State. I do not see why we should single out Japan's preparation alone as an aggressive one." Had Pal J. drawn attention to the identity of the country which denounced the Soviet-Japanese Non-Aggression Treaty and later declared war, and the date of that declaration, he would have been even less willing to find the accused guilty of aggressive war against the Soviet Union.

Pal J. regarded himself as an independent international judge and did not hesitate to condemn Allied methods of warfare and compare them with those of the accused before the Tokyo Tribunal. He drew attention to the Kaiser's desire to use indiscriminate destruction during the First World War in an attempt to shorten hostilities, and "this policy of indiscriminate murder to shorten the war was considered to be a crime. . . . If any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, the decision to use the atom bomb is the only near approach to the directives of the German Emperor during the First World War and

of the Nazi leaders during the Second World War. Nothing like this could be traced to the credit of the present accused." In view of the rape of Nanking, the Siamese railway, the massacre in the Philippines and similar outrages one is perhaps entitled to take issue with this last comment of the judge.

Whether one agrees with the reasoning of Pal J. or not, one is compelled to admire the integrity and courage of this representative of the British-Indian legal profession and to express gratitude to Messrs. Sanyal & Co. for having made his judgment available.

L. C. Green.

Harris's Criminal Law. Nineteenth edition. By H. A. Palmer, m.a., of the Inner Temple, Barrister-at-Law, Assistant Master of the Supreme Court, Registrar of the Courts-Martial Appeal Court, and Assistant Registrar of the Court of Criminal Appeal, and Henry Palmer, m.a., of the Inner Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. xlvii and 683 pp. and index. 32s. 6d. net.]

Wilshere's Criminal Procedure. Third edition. By the same Editors. [London: Sweet & Maxwell, Ltd. xxiv and 293 pp. and index. 22s. 6d. net.]

Harris's *Criminal Law* is well known to practitioners and students, as well as to police officers and others outside the profession. Perhaps the most noticeable changes in this new edition are those consequent upon the passing of the Magistrates' Courts Act, 1952. As that Act is more in the nature of a codifying statute than one effecting alterations in the law, so the consequential changes in Harris are more in arrangement than in substance, but they have enabled the chapters relating to magistrates' courts and the procedure therein to tell a much more comprehensible and satisfying story than was formerly possible.

Another welcome change is the arrangement of the work into thirty-three chapters, consecutively numbered, in place of the former division into "Books" and "Parts." Your reviewer had frequently found the old arrangement inconvenient.

In substance this edition merely brings the work up to date, the general treatment of the subject following the same lines as previous editions. It contains a vast amount of information, offered without much explanation or many examples. The secret of the book's popularity lies, in our view, in lucidity of arrangement, which makes Harris excellent for quick reference, in the assurance that the principles of the particular aspect of the subject to which the reader wishes to refer will be found concisely set out in such a way as greatly to simplify any further research. It is surprising, bearing in mind the nature of the work, that quite frequently the reader need look no further.

It is unfortunate that two pages of Addenda are necessary but in view of the activities of our legislators and law reporters and of the time needed to prepare books for publication nowadays, this sort of thing has become inevitable.

Wilshere's *Criminal Procedure* is in substance the last thirteen chapters of Harris reproduced in a separate volume, primarily for the use of students. It deals with procedure in all courts on trial both of indictable offences and matters of summary jurisdiction, including appeals. There is also a chapter on evidence.

S. H. Bate.

An Estate Duty Note Book. By G. Boughen Graham, ll.b., Barrister-at-Law. [London: Solicitors' Law Stationery Society, Ltd. 1954. xvi and 123 pp. with index 11 pp. 17s. 6d. net.]

This work is, as its title suggests, neither a students' book nor a comprehensive treatise on Estate Duty law; the author has confined himself to those problems likely to arise in the administration of small or moderate estates and has kept the newly admitted solicitor primarily in view; difficulties not normally met in such estates, *e.g.*, the "foreign element" or "controlled companies" are deliberately excluded from consideration. The subject-matter is clearly set out, the several chapters being subdivided into a number of short headings; the effect of the estate duty provisions in the Finance Act, 1954, is fully dealt with so far as the scheme of the work requires. The chapters on "Personal Property" (II)—and especially "Partnership Property" (pp. 13–16) and "Interests in Expectancy" (pp. 18–22)—"Settled Property" (V), "Policies of Assurance" (VIII) and "Gifts Inter Vivos" (X) are particularly lucidly written. Besides the usual tables of cases and statutes there is a very full index for the size of the work, most important for quick reference. This book should prove useful not only for the tyro in this branch of the law but also for the experienced practitioner as a "refresher" course.

A. F.

The Law of Stamp Duties. By J. G. Monroe, b.a., Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1954. xx and 180 and (index) 22 pp. 25s. net.]

The need for a simple short work on Stamp Duties has become apparent for some time, since the doubling of all *ad valorem* duties by the Finance Act, 1947 (s. 52) has considerably enhanced their importance in property transactions as correspondence in the national press shows, while The Law Society's recent inclusion of the law relating to stamp duties as a compulsory subject in their Final Examination has made such a work indispensable for the student. This need has been adequately met by Mr. Monroe's work which, unlike the standard works on the subject, is written in a most readable narrative form. The stamp duties covered by the work include only those charged under the Stamp Act, 1891, and the Finance and other Acts connected with it; this treatment follows from the definition of the duties contained in the recent decision in *Re Elsie Inglis (London) Memorial Fund* [1954] 1 W.L.R. 107. The learned author draws on his considerable practical experience of these duties, particularly where Revenue practice is concerned in doubtful matters.

After an opening chapter dealing with general principles and one on the "fixed duties" of 2d., 6d., and 2s. 6d., the author devotes the next seven chapters to the various types of transactions attracting the duties, namely, Conveyances on Sales, Leases, Mortgages, Bond Covenant Duty—which Mr. Monroe suggests would be better thermed "Periodical Payment Duty"—Settlements, Voluntary Dispositions and Commercial Contracts, *e.g.*, Bank Notes, Bills of Exchange, Insurance Policies and Contract Notes; the last chapter deals with the duty on the Share and Loan Capital of Corporations. Then follows an excellent Table of Duties and the Extra-Statutory Concessions of the Revenue. Throughout the author points out ways by which the incidence of the duties may be mitigated while abstruse matters, perhaps beyond the needs of the student, are dealt with in footnotes. The Tables of Cases and Statutes are satisfactory while the Index is thorough indeed, consisting of no fewer than 22 pages in relation to 139 of the narrative text.

This little work is clearly indispensable to any articled clerk faced with the Final Examination; many a practitioner, however, should find it most useful for quick reference thanks to the abundant index though, of course, he would turn to the more ample standard works for recondite or complex problems.

A. F.

INCOME TAX LAW AND PRACTICE. By CECIL A. NEWPORT, F.A.C.C.A., and H. G. S. PLUNKETT, Barrister-at-Law (formerly one of H.M. Inspectors of Taxes). Twenty-sixth edition. [London: Sweet & Maxwell, Ltd. 1954. xxxix and 406 and (index) 29 pp. 27s. 6d. net.]

THE current edition of this hardy annual appears under new co-authorship, for Miss Plunkett, the learned editor of the invaluable "*CLITAS*," replaces Mr. O. J. Shaw; at the same time the book has been reset, many passages rewritten with advantage and the text broken up into numbered paragraphs which appear both at the head of the pages and in the index—a most useful innovation.

As this work was critically reviewed as recently as (1953) 16 M.L.R. 267–8, little further comment seems required though it may be observed that the deficiencies there pointed out still remain in the current work. In future editions reconsideration might also be given to the question of "Reopening Accounts"—para. 163 according to the index but in the text under "Uncompleted Contracts"—and to the classic *Woolcombers'* and other leading cases on the topic, recapitulated in *Severne* v. *Dadswell* [1954] 1 W.L.R. 1204. It is strange, too, that in para. 146—"Repairs and Renewals"—no reference is made to the recent leading cases of *Phillips* v. *Whieldon Sanitary Pottery Co. Ltd.* (1952) 33 T.C. 213 and *Lawrie* v. *C. I. R.* (1952) 34 T.C. 344. These and other like omissions diminish the value of the work for the legal practitioner though it still remains, with its excellent arithmetical examples, a very good practical work eminently suited for its particular public.

A. F.

Books and Publications Received

THE LAW OF COMPULSORY MOTOR VEHICLE INSURANCE IN SOUTH AFRICA. By ARTHUR SUZMAN, Q.C., and GERALD GORDON, Q.C. [Juta & Co., Ltd., P.O. Box 30, Cape Town. 1954. xi and 288 pp. 57s. 6d. plus postage.]

PRESTON AND NEWSOM ON LIMITATION OF ACTIONS. Supplement to Third Edition. By G. H. NEWSOM and LIONEL ABEL-SMITH. [London: The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. 1954. 20 pp. 3s. 6d. net. Book and Supplement 75s.]

KONSTAM ON INCOME TAX. Cumulative Supplement No. 3 to the Twelfth Edition. [London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. September, 1954. 74 pp. 6s. net.]

RIVINGTON'S EPITOME OF SNELL'S EQUITY. (Twenty-fourth Edition) Fourth Edition. By PATRICK JENKIN, B.A. [London: Sweet & Maxwell, Ltd. 1954. viii and 163 pp. 17s. 6d. net.]